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N O. 2 1 3 9 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3437

v. 3437

ARTHUR R. DECATUR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

DEC 26 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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DEC 27 1967



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR R. DECATUR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND
STATEMENT OF THE CASE

The appellant, Arthur Ronald Decatur, was indicted on February 16, 1966 by the Federal Grand Jury for the Southern District of California, Central Division. ^{1/}

Counts 2, 3 and 4 of this indictment charge appellant Decatur, together with one Ruby Jean Jackson, who plead guilty before trial and is not an appellant, with the possession of stolen

^{1/} C. T. 2; "C. T." refers to Clerk's Transcript of Proceedings. Reporter's Transcript of the Proceedings will be referred to as "R. T."

mail, in violation of Title 18, United States Code, Section 1708, and with aiding and abetting the forgery and uttering of a United States treasury check, in violation of Title 18, United States Code, Section 2 and 495 (C. T. 2-5).

Appellant was arraigned on February 24, 1966, and a plea of not guilty was entered (C. T. 6).

A jury was impanelled and sworn on March 28, 1966 (C. T. 16). A Motion to Suppress was filed on March 29, 1966 (C. T. 17-23), and was denied on March 30, 1966, by the Honorable Thurmond Clarke, whereupon trial of the case to a jury immediately commenced (R. T. 61-62). On March 31, 1966, the jury returned a verdict of guilty as charged in Counts 2, 3 and 4 of the indictment (C. T. 46).

On April 6, 1966, appellant was sentenced to imprisonment for a period of two years on each of counts 2, 3 and 4, to begin and run consecutively, for a total of six years, under Title 18, United States Code, Section 4208(a)(2) (C. T. 49-50).

Appellant filed notice of appeal, effective as of April 15, 1966 (C. T. 51).

The jurisdiction of the District Court is predicated on Title 18, United States Code, Sections 2, 495 and 1708, and Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28 of the United States Code.

II

STATUTES INVOLVED

Count One of the Indictment charges a violation of Title 18, United States Code, Section 1708, which reads in pertinent part:

"Whoever . . . unlawfully has in his possession, any letter . . . which has been stolen, taken embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted --

"Shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

Counts Two and Three of the Indictment charge a violation of Title 18, United States Code, Section 495, and Title 18, United States Code, Section 2.

Title 18, United States Code, Section 495, reads in pertinent part as follows:

"Whoever falsely makes, alters, forges, or counterfeits any -- deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or enabling any other person, either directly or indirectly to obtain or receive from the United States or any officers or agents thereof, any sum of money or:

"Whoever utters, or publishes as true any

such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

"Shall be fined not more than \$1,000 or imprisoned not more than ten years of both."

Title 18, United States Code, Section 2, reads in pertinent part as follows:

(a) "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

(b) "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

III

STATEMENT OF FACTS RELATIVE TO SEARCH AND SEIZURE

On January 3, 1966, Stanley M. Smoot, a postal inspector for 30 years, received a report that a relay box containing mail for delivery in the 6900 block of Miramonte had been opened and a number of letters containing checks were missing. Included in the list of missing checks was one payable to a Roberta Robinson

(R. T. 79).

On January 6, 1966, co-defendant Ruby Jean Jackson was arrested in the Sav-Mor Market while identifying herself as Roberta Robinson and attempting to pass the aforesaid missing check (R. T. 79-80).

Knowing this, and that defendant Jackson had made a telephone call to a non-published number registered to one Shirley Boone at 1030 West 104th Street, Los Angeles, the postal inspectors visited Boone's residence, on the day of Jackson's arrest, and at that location observed some photographic equipment, which Shirley Boone stated belonged to her boyfriend, whom she identified as Alvin Decatur (R. T. 80-82).

On January 19, 1966, Inspector Smoot received word from the postal laboratory in San Francisco that one of the enclosures and one of the envelopes recovered from Ruby Jean Jackson at the time of her arrest bore the latent fingerprints of appellant, Arthur Ronald Decatur (R. T. 83).

A warrant was issued for the arrest of Decatur, on January 19, 1966 (R. T. 83), and postal inspectors attempted to locate Decatur at his last known address, but found that the premises had been vacant since the previous November (R. T. 83).

Knowing that Decatur and Shirley Boone were acquainted, and that on one occasion, Ruby Jean Jackson had telephoned the Boone residence, the postal authorities began observation of the Boone residence. An automobile registered to Decatur was observed parked at Boone's residence "from time to time".

However, at no time was a driver seen in the vehicle (R. T. 83-84).

On the morning of January 21, 1966, Inspector Smoot telephoned the Boone residence and asked for "Art". A male voice came to the telephone, and the speaker identified himself as "Art".

Shortly thereafter, Inspector Smoot, together with other officers, knocked at the door of the Boone residence (R. T. 84). Smoot tried the door, having received no answer and found it to be unlocked. He announced his authority and purpose, advising that he was a United States postal inspector, and that he had a warrant for appellant Decatur (R. T. 98-99)

Upon entering, Inspector Smoot observed defendant Decatur lying in a bed in the front bedroom. Decatur pulled the sheet covers over his head (R. T. 84).

Inspector Smoot entered the room, pulled the covers back, and advised appellant Decatur that he was under arrest for the unlawful possession of stolen mail. After being informed of his constitutional rights, Decatur stated that he "well knew" what they were (R. T. 84-85).

In this room, immediately adjacent to Decatur's bed, Inspector Smoot observed "a layout of considerable photographic equipment", in full view (R. T. 85). Defendant Decatur admitted owning this property (R. T. 163).

The equipment included an enlarger (Court's Exhibit No. 1), a 120 millimeter Hasselblad camera (Government's Exhibit No. 2), some California driver's license documents which had paper pasted over them (Court's Exhibit No. 4), some photographic reproduc-

tions of the same covered driver's license documents (Government's Exhibit No. 5), a photographic reproduction of a California driver's license in the name of Thomas Herbert Decatur (Government's Exhibit No. 6), two photographic negatives depicting driver's licenses (Government's Exhibit No. 7), a bottle of photographic fluid (Government's Exhibit No. 8), and a box of Kodak Polycontrast photographic paper (Government's Exhibit No. 9), all of which exhibits were received into evidence without objection. Government's Exhibit No. 3, also received into evidence, consisted of some photographic negatives taken from co-defendant Ruby Jean Jackson at the time of her arrest (R. T. 86-93). If, indeed, any other evidence was discovered in the Boone residence or Decatur's automobile at the time of his arrest, such evidence was never offered at trial.

IV

ARGUMENT

NO ERROR WAS COMMITTED WHEN THE EXHIBITS, SEIZED FROM APPELLANT'S IMMEDIATE CUSTODY AND CONTROL AT TIME OF HIS LAWFUL ARREST, WERE RECEIVED INTO EVIDENCE WITHOUT OBJECTION.

Government's Exhibits 1, 2, 4, 5, 6, 7, 8 and 9 were the only exhibits offered at trial which had been seized by the postal inspectors as incident to the arrest of appellant Decatur, and all of these were found, lying in full view in the bedroom in which he was arrested. No objection was made at the time they were offered

into evidence. Appellant now complains that, "Although the arrest was lawful, and the seizure of most of the equipment and other evidence was made within the same room in which he was arrested, the Federal agents and their accomplices made a general, exploratory search of the rest of the premises in which the defendant was a guest." (Appellant's Opening Brief, page 8)

The record indicates that it is not a question of "most" of the evidence being seized from the immediate custody and control of the appellant, rather, all of the evidence was so discovered. And it is, of course, well settled that a search without a warrant which may be made as incident to a lawful arrest may under appropriate circumstances extend beyond the person of the one arrested to include the premises under his immediate control.

Harris v. United States, 1947, 331 U.S. 145,
67 S.Ct. 1098, 91 L.Ed. 1399;

Burks v. United States, 287 F.2d 117
(9th Cir., 1961).

Furthermore, appellant's contention that the evidence received was found in a general exploratory search has no foundation in the trial record. Even though appellant made such contention in an unsworn declaration filed in his Motion to Suppress (C.T. 21), he did not raise it when he took the stand during trial. Nor was Inspector Smoot, called as witness for the Government and for the defense, and subject to cross-examination, ever asked about the duration or extent of his search.

V

CONCLUSION

A review of the entire record reveals no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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ROBERT L. BROSIO,
Assistant United States Attorney,
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WILLIAM J. GARGARO, JR. ,
Assistant United States Attorney

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

COLAS RUIS RUBIO,

Petitioner,
Appellant,

vs.

MIGRATION AND NATURALIZATION
SERVICE,

Respondent.

APPELLANT'S OPENING BRIEF

FILED

MAR 14 1967

MAR 13 1967

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4 FOR THE NINTH DISTRICT
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No. 21393

NICOLAS RUIS RUBIO,

Petitioner,
Appellant,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITIONER'S BRIEF
ON PETITION FOR
JUDICIAL REVIEW

JURISDICTION

Jurisdiction is hereby invoked under the provisions of Section 241(a)(11) of the Immigration and Naturalization Act of Volume 8 U.S.C.A. and sections 242 of the Immigration and Naturalization Act. Jurisdiction of the District Court is predicated upon Title 18 U.S. Code., Section 323.

STATEMENT OF THE CASE

Appellant is an alien, a native and citizen of the Republic of Mexico, and was lawfully admitted to the United States as a legal resident and had a good record up until September 27, 1965 at which time a plea of "Nolo Contendre" was entered for violation of section 11530 of the Health and Safety Code,

1 State of California. On December 7, 1965, the Court, after
2 having ordered a probation report, "Suspended proceedings."
3 Probation was granted for a period of three years on condition
4 that appellant spent the first 30 days in the County Jail and
5 cooperate with the probation officer in meeting certain other
6 terms of his probation.

7 Thereafter, the Immigration and Naturalization Service
8 instituted deportation proceedings against appellant by ordering
9 an "Order to Show Cause", charging appellant with violation of
10 section 241(a)(11) of the Immigration and Naturalization Act
11 8 U.S.C. 1251 (a)(11) providing in part for the deportation of
12 any alien who at any time has been convicted of a violation of
13 or a conspiracy to violate any law or regulation relating to
14 the illicit possession of or traffic of narcotics, drugs,
15 or marijuana.

16 Hearing was conducted by a special inquiry officer of the
17 Immigration and Naturalization Service and after evidence was
18 received on the 25th day of March, 1966 rendered his decision
19 ordering the deportation from the United States of appellant
20 herein. Appellant did within the time prescribed by law, filed
21 Notice of Appeal to the Board of Immigration Appeals from the
22 decision of said special inquiry officer. The said Board, did
23 on October 20, 1966, order the appeal dismissed and affirmed
24 the decision of the special inquiry officer.

25 STATEMENT OF FACTS

26 At the Order to Show Cause hearing, conducted on

1 March 25, 1966, appellant admitted: 1. That he was not a
2 citizen or nationale of the United States. 2. That he was
3 a native of Mexico and a citizen of Mexico. 3. That he
4 entered the United States at San Jacinto, California on
5 January 19, 1960. 4. That he was then admitted as an Immigra
6 but denied the fifth allegation that on December 7, 1965, In
7 the Superior Court of the State of California, County of
8 Los Angeles, he was convicted for the offense of possession of
9 marijuana in violation of section 11530 of the Health and
10 Safety Code of the State of California. He further denied tha
11 he was subject to deportation pursuant to the provisions of
12 law under section 241(a)(11) of the Immigration and
13 Naturalization Act, in that, he had been convicted of a
14 violation of any law or regulation relating to the illicit
15 possession of marijuana in violation of section 11530 of the
16 Health and Safety Code of the State of California.

17 At that hearing an affidavit was submitted by the
18 Government's Counsel, signed by the appellant, to which
19 affidavit there was an objection entered. The affidavit is
20 item 85 of records file of deportation proceedings. After the
21 Government had no further questions and no further evidence,
22 the special inquiry officer requested of appellant's counsel
23 whether he desired to question respondent. Counsel made a
24 motion for an opportunity to file a predecision brief in behal
25 of appellant. (Transcript of Hearing held January 24, 1966,
26 page 75 of the administrative record.) Counsel for appellant

1 moved that the Court permit and preserve the right for Counsel
2 to be given and granted an opportunity to reopen the case in
3 a future date. (Page 78 of Administrative Record.) Counsel
4 was given twenty (20) days in which to prepare a predecision
5 brief. The predecision brief was tendered within the time
6 allotted and at the time of tendering the said brief a
7 transmittal letter was filed with it wherein appellant's counsel
8 requested that he be advised of the continued date. This is
9 letter dated February 14, 1966. (Page 44 of Administrative
10 record.) On March 25, 1966, special inquiry officer rendered
11 his decision and ordered that the appellant be deported from
12 the United States to Mexico on the charges contained in the
13 Order to Show Cause. On July 7, 1966, the special inquiry
14 officer, after he had rendered his decision and upon a review
15 of the record he noticed that the record indicated that the
16 hearing was subject to a resumption of the proceedings, if
17 request was made within twenty days. Noting also that such
18 request was made by the cover letter of February 14, 1966,
19 Further, paragraph 3 of said letter (Page 25 of Administrative
20 Record) states whether we desire further proceedings in this
21 matter.

22 A letter of July 29, 1966, written by appellant's counsel
23 in answer to the July 7, 1966, letter of the special hearing
24 officer indicates that appellant did not desire a further
25 hearing on this matter.

26 After the March 25, 1966 Order rendered by the special

1 hearing officer, ordering the deportation from the United
2 States of appellant herein and within the time prescribed by
3 law appellant filed a Notice of Appeal to the Board of
4 Immigration Appeals from the decision of said inquiry officer.
5 The Board did, on October 20, 1966, ordered the appeal
6 dismissed and affirmed the decision of the special inquiry
7 officer.

8 Thereafter, and within the time prescribed by law, the
9 appellant filed a petition for judicial review.

10 SPECIFICATION OF ERRORS

11 The special hearing officer and the Board of Immigration
12 Appeals erred, as a matter of law, in determining that:

13 1. Rendering an order deporting the appellant after the
14 Government had rested its case, but prior to any evidence being
15 submitted by appellant.

16 2. That petitioner was a deportable alien and that he had
17 been convicted of a violation of section 11530 of the Health
18 and Safety Code of the State of California.

19 3. That he was subject to deportation under the provisions
20 of section 241(a)(11) of the Immigration and Naturalization Act.

21 4. That appellant's proceedings had reached such finality,
22 upon which an order of deportation could be predicated.

23 5. In that appellant was denied due process of law under
24 the Fourteenth Amendment of the Constitution of the United
25 States.

26 6. In that appellant is being subjected to cruel and

inhuman punishment under the Eighth Amendment of the Constitution of the United States.

ARGUMENT

I

ERROR IN RENDERING ORDER DEPORTING APPELLANT AFTER GOVERNMENT RESTED ITS CASE BUT PRIOR TO APPELLANT RESTING ITS CASE

Appellant's rights were violated in the special hearing officer's order prior to appellant's resting its case constituted a violation of the Due Process Clause of the United States Constitution.

Appellant's position may be that a request was made by letter dated July 7, 1966, to advise the special hearing officer, if further hearing was desired, and that appellant's counsel advised the hearing officer that no further hearing was desired.

It is submitted that at the time appellant's counsel refused a reopening of the case the hearing officer had determined the case and rendered his decision and "Order of Deportation" was already entered. The appellant's position had already been prejudiced. It was not the position of the appellant's counsel to agree to a reopening of the hearing. It was the duty and obligation of the hearing officer to "Set the Decision of Deportation Aside" and proceed with the hearing. A statement by appellant's counsel that he did not "desire a further hearing", on a proceeding which was already determined by the hearing

1 officer and where an order of deportation was entered, does
2 not constitute a waiver of appellant's right to charge that
3 there was a violation of his constitutional rights in that he
4 did not get a just and fair hearing.

5
6 II

7 RULING THAT PETITIONER WAS A
8 DEPORTABLE ALIEN AND HAD BEEN
9 CONVICTED OF A VIOLATION OF
10 VIOLATION OF SECTION 11500 OF
11 THE HEALTH AND SAFETY CODE OF
12 THE STATE OF CALIFORNIA SO AS
13 TO FALL WITHIN THE MEANING OF
14 SECTION 241(a)(11) OF THE
15 IMMIGRATION AND NATURALIZATION
16 ACT

17 It is the appellant's contention that he is not deportable
18 pursuant to the provisions of Section 241(a)(11) of the
19 Immigration and Naturalization Act, in that he has not been
20 convicted of a violation of unlawful possession of narcotics
21 under the provisions of Section 241 of the Immigration and
22 Naturalization Act or that he is a deportable alien.

23 "Section 241(a)(11) reads as follows:

24 "Any alien in the United States . . . shall,
25 upon the order of the Attorney General, be deported who --

26 "(11) is, or hereafter at any time after entry
has been, a narcotic drug addict, or who at any time
has been convicted of a violation of, or a conspiracy
to violate, any law or regulation relating to the illicit
possession of or traffic in narcotic drugs or marihuana,
or who has been convicted of a violation of, or a

1 conspiracy to violate, any law or regulation governing
2 or controlling the taxing, manufacture, production,
3 compounding, transportation, sale, exchange, dispensing,
4 giving away, importation, exportation, or the possession
5 for the purpose of the manufacture, production,
6 compounding, transportation, sale, exchange, dispensing
7 giving away, importation, or exportation of opium, coca
8 leaves, heroin, harihuana, any sale derivative or
9 preparation of opium or coca leaves or isonipecaine or
10 any addiction forming or addiction=sustaining opiate.'

11 (8U.S.C.A. 1251)

12 A DEFENDANT FOUND GUILTY OF A NARCOTICS
13 VIOLATION WHEREIN A TRIAL COURT'S SUSPENDED PROCEEDING
14 AND WHEREIN A PLEA OF NOLO CONTENDERE HAS BEEN MADE,
15 HAS NOT BEEN CONVICTED AND THUS HAS NOT LOST HIS CIVIL
16 RIGHTS AND, THEREFORE, NOT SUBJECT TO DEPORTATION.

17 Where an alien has been found guilty of narcotics
18 violation and where a Nolo Contendere plea has been
19 entered and proceedings against him are suspended, as
20 in the instant matter, he has not lost any of his civil
21 rights under the State and Federal Constitutions, and,
22 therefore, not subject to deporation from the United
23 States upon the grounds that he has been 'convicted'
24 which subjects him to the loss of his civil rights to
25 be and remain in the United States.

26 Wherein a plea of Nolo Contendere is entered, it

1 is called a plea of "non vult", which literally means
2 'I do not wish to contend,' but it does not per se
3 mean to establish that the Respondent is admitting
4 guilt.

5 Assuming but not admitting a plea of Nolo
6 Contendere is an admission of guilt, it is only an
7 admission for the purposes of the case and cannot be
8 used as an admission in a civil case for the same act
9 and does not estop defendant to deny facts upon which
10 the prosecution was based in subsequent civil proceedings.
11 Twin Ports Oil Co. v. Pure Oil., D.C. Minn, 26 F.Supp.
12 266, 376. It is contended that deportation is not a
13 criminal proceedings but is civil in fact and to
14 institute criminal or quasi-criminal type proceedings
15 is to impose great hardships and to do so is in complete
16 violation of Due Process.

17 Appellant has not been convicted of a crime which
18 subjects him to deportation. As held in Bubar v. Dizdar,
19 60 N.W.2d 77, 79, 80; 240 Minn. 261, a conviction is in
20 its technical legal sense the final consummation of
21 prosecution against the accused, including judgment or
22 sentence or plea of guilty. Here, Respondent did not
23 plead guilty. The respondent plead nolo Contendere. It
24 is an elementary rule that a judgment is not evidence of
25 the facts adjudicated by it. As was held in State v.
26 L.A. Rose, 52 A. 943; 71 N.H. 435 (Supt. Ct. N.H. 1902)

1 (p. 945):

2 "'. . . Under the plea of Nolo, the defendant does
3 not confess or acknowledge the charge against him as
4 upon a plea of guilty (or verdict); but, waiving his
5 right to contest the truth of the charge against him,
6 submits a punishment. The plea is in the nature of a
7 compromise between the state and the defendant, - a
8 matter not of right but of favor. Various reasons
9 exist why a defendant, conscious of innocence, may
10 willing to forego his right to make defense, if he
11 can be permitted to do so without acknowledging his
12 guilt. Whether in a particular case, he should be
13 permitted to do so, is for the court.' (Emphasis
14 added)

15 The Department of Immigration cannot condemn the Appellant
16 and subject him to deportation in this matter, depriving him
17 of his civil rights. Here, Appellant did not confess any
18 guilt; Appellant was not found guilty after a full trial on
19 the merits; here he forewent a defense, and as held in the
20 above referenced case, it does not per se mean a confession
21 or acknowledgment of the accusation.

22 The Judge in the Superior Court in his opinion found
23 defendant (Appellant) guilty as charged. His findings
24 were perhaps based on Appellant's failure to allege a
25 defense, but again we will reiterate that this did not
26 per se indicate guilt or acknowledge the crime.

1 An alien who has been found guilty of a narcotics
2 violation, to-wit, possession on a Nolo Contendere
3 plea, should not lose his civil rights under the state
4 or federal constitutions. To deport him is to violate
5 said civil right.

6 Nolo Contendere means that the accused will not
7 contest it and in such plea the accused states he does
8 not wish to contend with the state, Winesett v. Scheidt,
9 79 S.E.2d 501, 504, 239 N.C. 190. It is axiomatic that
10 technically a plea of Nolo Contendere is an ancient plea
11 in criminal cases, where the legal effect of the plea
12 is offered and accepted by the court in respect to the
13 case in which it is interposed, and in respect to that
14 case only.

15 It has been held that Nolo Contendere cannot be
16 used against the accused as an admission in any civil
17 case; thus, it would follow that a finding of guilt in
18 a case of possession of marihuana based on a Nolo
19 Contendere plea cannot be used at an immigration hearing
20 to establish bases for deportability of an alien pursuant
21 to Section 241(a)(11) of the Immigration and Nationality
22 Act.

23 The case of Wright v. State, 44 S.E.2d 569, 75 Ga.
24 App. 764, held that:

25 "' . . . Nolo contendere cannot be used against accus-
26 -ed as an admission in any civil suit for the same

1 act and the plea may not be used to effect civil rights
2 or to effect civil disqualification. . . .'

3 Here by permitting and allowing the findings of
4 prior criminal court into this hearing is to use the
5 Nolo Contendere plea as an admission to deprive Respondent
6 of his civil rights and civil qualifications, and it is
7 further alleged here by Respondent that this cannot be
8 done by the Board because the Board hearing in effect
9 constitutes a civil suit.

10 Evidence of a plea of Nolo Contendere is not admis-
11 sible either as an admission or as proof of guilt, and
12 this is so whether the instant case is based on the same
13 facts or whether the instant case is founded upon
14 unrelated facts. Piassick v. United States, 253 F.2d 658
15 (U.S.C.A. 5th, 1958). It would therefore follow that
16 the evidence of conviction of the criminal case involving
17 Respondent should not be admitted to disqualify him of
18 his civil rights.

19 The doctrine of dual definition can be a very
20 useful tool in the administration of justice when its
21 many applications, both criminal and civil, are well
22 understood. But when misunderstood and misapplied,
23 miscarriages of justice may result.

24 Application to the felony/misdemeanor offense -

25 Section 17 Penal Code, in distinguishing felonies
26 from misdemeanors, provides that where a crime is

1 punishable in the alternative either by a prison sentence
2 or by a county jail sentence or fine it shall be deemed
3 a misdemeanor 'after a judgment imposing a punishment'
4 other than a state prison sentence.

5 A plethora of offenses defined in the Penal Code
6 and in penal sections of other codes are punishable in
7 the alternative, some being specifically declared felonies
8 and some not. Even when declared felonies, they are
9 nevertheless deemed misdemeanors if an applicable
0 misdemeanor sentence is imposed. (Witkin, Calif. Crimes,
1 Vol. 1, p. 43). However, a felony punishable only by
2 imprisonment in the state prison remains a felony even
3 though a county jail term is imposed as a condition of
4 probation. Such a jail term is not a sentence. (In
5 Re Hays (1953), 120 C.A.2d 308; In Re Goetz (1941),
6 46 C.A.2d 848).

7 California courts long ago adopted and still
8 adhere to the 'narrow' definition of conviction in
9 felony/misdemeanor cases, and upon a plea, finding
0 or verdict of guilty, a felony status immediately attaches,
1 and the offense remains a felony except when the
2 discretion of the court is actually exercised and the
3 prisoner is punished only by fine or imprisonment in
4 county jail. (People v. Williams (1945), 27 Cal.2d 220;
5 In Re Rogers (1937), 20 C .A.2d at p. 400; People v.
6 Banks, 53 Cal.2d 370.)

1 Thus, where probation is granted with the imposition
2 of 30 days in county jail, the court has 'exercised
3 its discretion' to impose a misdemeanor sentence, and
4 the offense remains a felony, subject, however, to
5 exceptions relating to civil rights and privileges. The
6 court may, however, declare the offense to be a misdemeanor.
7 (Section 17 Penal Code, as amended in 1963.)"

8 The word "conviction" is of equivocal meaning and its use
9 in a statute may vary with the particular statute involved
10 and it presents a question of legislative intent. De Vean
11 v. Braisted, 174 N.Y.S. 2d 596, 605, 5 A.D.2d. 60d.

12 Appellant, therefore, contends that the quivocal
13 meaning of the word "conviction" as applied to the plea
14 Nolo Contendere establishes a punishment for failure on
15 the part of appellant to answer the charge. Having been
16 found guilty on the Nolo Contendere plea, however, this
17 does not mean that appellant was in fact convicted.

18 "
19 "Conviction" in its legal sense, means the final consummation
20 of a prosecution against the accused including judgment
21 or sentence rendered pursuant to a verdict, confession
22 or plea of guilty. Bubar v. Dizdar, 60 N.W.2d. 77. 79. 80.
23 240 M.M.M. 26.

24 Section 241 (a)(11) spells out that a person is deportable
25 if convicted but the Act fails most seriously in defining
26 upon what guilt the conviction should be based. As the word
conviction is broad in scope and has an equivocal meaning, it

1 is appellant's contention that the failure to fix and attach
2 a significance to the word conviction in the Act itself is a
3 violation of the Due Process Clause of the Federal Constitution

4 The case of Jones v. Kelly, 194 N.W.2d 585, 586, 588,
5 9A.D.2d 395, established that there is no fixed significance
6 attached to the word conviction or the phrase "judgment of
7 conviction", and courts are free to look for legislative
8 intent with respect to the meaning of such words. It would
9 thus follow that no fixed significance having been established
10 in the Act itself and the appellant having the legal right not
11 to contest and entering a plea of Nolo Contendere, that it
12 is the obligation of this Court to establish legislative
13 intent and the rendering of punishment does not per se mean
14 a conviction and the fact that the Act herein referred to is
15 lacking in proper construction, it can not arbitrarily make
16 a clean sweep of all cases where a person has been punished.
17 A conviction means a judicial determination of contested
18 facts. C.L. % 6194. People v. Brown, 286 P. 859, 861,
19 87 Color. 261. Therefore it does not mean a sentence per se
20 nor a plea.

21 The meaning of the word convicted when used in the criminal
22 statutes varies with the context of the particular statute in
23 which it is used. State vs. De Bery, 103 A2d 523, 524,
24 150 Me. 28; therefore it follows that the act referred to
25 herein is lacking in explicitness and thus would have different
26 interpretation.

1 The Chairman of the Immigration and Naturalization Board
2 of Appeals contends that in their opinion the state courts
3 rendering of a judgment granting the appellant a three year
4 period of probation with a 30 day jail sentence amounted to
5 a setnence sustained the evidence of record does not in our
6 opinion constitute a conviction. As indicated above it
7 is appellant's contention that the word convicted varies with
8 the context of the particular statute or case and unless
9 the act specifically spelled it out it is an arbitrary act on
0 the part of the Immigration and Naturalization Department to
1 interpret punishment, where the proceedings are suspended, on
2 a Nolo Contendere plea, as arbritarily meaning a conviction,
3 since the word "conviction" is of an equivocal meaning without
4 any special significance attached thereto.

5 It is therefore, contended that there has been a flagrant
6 violation of the Due Process Clause of the Constitution.

7 That appellant was subjected to cruel and inhuman
8 punishment.

9 The Board of Immigration Appeals urges that it is not
0 within the province of the Board to pass on the constitutionality
1 of the Immigration laws it adjudicates and administers and
2 he quotes matter of L., 4 I & N Dec. 556, BIA, November 21, 1951.

3 It is respectfully submitted that the Board can not validly
4 argue such a position. The Board has a duty to evaluate and
5 administer the laws properly. This requires an interpretation
6 of the law as intended by the Legislature and the fathers of

1 the Constitution. To rule without proper construction of the
2 law is to breach the rights of the people under the protection
3 of the Constitution.

4 Assuming but not admitting that it is within the province
5 of the Board to pass on the constitutionality of the laws it
6 adjudicates and administers then it is certainly within the
7 province of this Court to rule thereon.

8 The Immigration Department, without information
9 concerning the factual situation of Appellant's culpability,
10 extent of involvement in in the commission of the
11 offense, and his history and background, now seeks to
12 enforce an order to be made making Appellant' deportable.
13 However, in doing so, it must consider the state
14 court's suspension of proceedings and the felony/misdemeanor
15 sentence. Also, it must consider that the Judge's
16 finding of 'guilty' was predicated upon the nolo contendere
17 plea of Appellant.

18 Banishment has been deemed by the Ninth Circuit
19 Court as worse than death. Separation from one's family
20 relatives and friends, where one's roots have been
21 grounded in this country for six years is certainly the
22 infliction of punishment in the human sense that far
23 exceeds permissible limits. Where the statute prescribes
24 deportation only upon a conviction and not a mere
25 finding of guilt, to deport under the circumstances is
26 cruel and inhuman.

1 As said by Justice Douglas in Bridges v. Wixon,
2 326 U.S. 135:

3 "'Though deportation is not technically a criminal
4 proceeding, it visits a great hardship in the individual
5 and deprives him of the right to stay and live and work
6 in this land of freedom. That deporation is a penalty --
7 at times a most serious one -- cannot be doubted.
8 Meticulous care must be exercised lest the procedure
9 by which he is deprived of that liberty not meet the
10 essential standards of fairness.'

11 In a concurring opinion, Justice Murphy makes the
12 following pertinent observation:

13 "'But the Constitution has been more than an
14 silent, anemic witness to this proceeding. It has not
15 stood idly by while one of its subjects is being
16 excommunicated from this nation without the slightest
17 proof that his presence constitutes a clear and present
18 danger to the public welfare. Nor has it remained
19 aloof while this individual is being deported,
20 resulting in the loss "of all that makes life worth
21 living," Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L.
22 ed 938, 942, 42 S Ct 492.'

23 "'The Bill of Rights is a futile authority for
24 the alien seeking admission for the first time to
25 these shores. But once an alien lawfully enters and
26 resides in this country he becomes invested with the

1 rights guaranteed by the Constitution to all people
2 within our borders. Such rights include those pro-
3 tected by the First and the Fifth Amendments and by
4 the due process clause of the Fourteenth Amendment.
5 None of these provisions acknowledges any distinction
6 between citizens and resident aliens. They extend
7 their inalienable privileges to all "persons" and
8 guard against any encroachment on those rights by
9 federal or state authority."

10 While we appreciate and agree that deportation proceedings
11 are not criminal in their nature, the effect can be far
12 more serious.

13 Here, it would be cruel and inhuman to separate
14 Respondent from his family. His loved ones are all
15 minors of tender years who need his love and guidance
16 during these formative years before adulthood. To deport
17 him would also place a tremendous hardship on his wife
18 by having to support these minors with the assistance of
19 Respondent; which might ultimately cause an imposition
20 on state assistance institutions. Respondent would
21 rather stay with his family than to be forever separated
22 from them.

23 CONCLUSION

24 Whereas here deportation is sought to be effected
25 predicated upon the petitioner's having been "convicted" of a
26 crime, a strict interpretation of the deportation statute

1 should be followed, otherwise the consequence of the deportation
2 constitutes a violation of Due Process and is cruel and
3 unusual and result in punishment far more severe than the
4 mere infliction of a jail sentence predicated upon a conviction.

5 By reason of the foregoing the Petitioner prays this
6 Court should sustain Petitioner's objections and enter an
7 Order that the Order of Deportation be annulled.

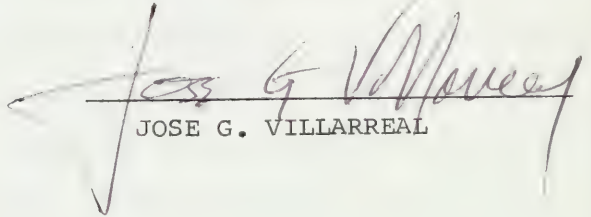
8
9 Respectfully submitted,

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11 
12 JOSE G. VILLARREAL

13 Attorney for Petitioner
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C E R T I F I C A T E

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.


JOSE G. VILLARREAL

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, said I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of 18 years and not a party to the within action or proceedings; that my business address is 430 South Broadway, Los Angeles, California. That on March , 1967, I served the within Petitioner's Brief of Petition for Judicial Relief on the respondent in said action by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a mailbox regularly maintained by the U. S. Government at Los Angeles, addressed to the attorney of record for said respondent at the office address of said attorney, as follows:

Office of the Attorney General	U. S. Attorney Office
Department of Justice	312 North Spring Street
Washington, D.C.	Los Angeles, California
Legal Department-A 11-966-902 No. 21393	

United States Department of Justice	Mr. J. Swreck
Immigration and Naturalization	Regional Counsel
Washington, D.C.	Immigration and
Legal Department-A-11-966-902	Naturalization
No. 21393	Terminal Island, Calif

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on March // , 1967 at Los Angeles, California.


ISABEL VILLARREAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMMY WILLIAMS,

Petitioner and Appellant,

vs.

WALTER H. DUNBAR, et al.,

Respondent and Appellee.

NO. 21395

APPELLEE'S BRIEF

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DEC 1965

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMMY WILLIAMS,

Petitioner and Appellant,

vs.

WALTER H. DUNBAR, et al.,

Respondent and Appellee.

NO. 21395

APPELLEE'S BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California, dismissing appellant's complaint for damages, in the proceeding entitled Williams v. Dunbar, No. 45119, was issued on August 12, 1966 (CT 96-97). Appellant alleged that the claim arose under Title 42, United States Code sections 1983 and 1985 (the Civil Rights Act). The jurisdiction of the district court was sought under Title 28 United States Code sections 1343 (3) and (4). The jurisdiction of this Court is invoked under Title 28 United States Code sections 1291 and 1915.

STATEMENT OF THE CASE AND OF THE FACTS

Appellant is in the custody of the warden of the California State Prison at San Quentin pursuant to a

judgment pronounced by the Superior Court of Los Angeles County, dated February 19, 1959, in the action entitled People v. Williams, No. 209476, finding appellant guilty, upon his plea of guilty, of assault with a deadly weapon, in violation of section 245 of the California Penal Code (CT 74, 87). He was paroled from state prison on September 5, 1960, which parole was revoked on August 29, 1961 (CT 74, 86).

On July 17, 1962, appellant was again granted parole (CT 74, 86). Appellant executed conditions of parole which included a condition that he cooperate at all times with his appointed parole agent, and that he maintain good behavior and attitude to justify continuing parole (CT 74, 79A). Appellee David L. Harris, a parole officer with the Adult Parole Division of appellee California Adult Authority, was designated appellant's parole agent (CT 75-76).

On August 13, 1962, appellant was arrested by appellee Harris pursuant to section 3056 of the California Penal Code. ^{1/} (CT 76, 80). Harris reported to the California Adult Authority that appellant had violated a condition of his parole (CT 80-83). Harris' recommendation that parole be cancelled was approved by his supervisor,

1. Section 3056 provides: "Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the enclosure of the prison."

appellee T. R. Nissen (CT 83). On October 2, 1962, the California Adult Authority formally cancelled the parole (CT 85). He was returned to state prison on October 18, 1962 (CT 86). On November 19, 1962, he was afforded a hearing on the parole violation charge (CT 84). He pled not guilty but was found guilty and parole was revoked (CT 84).

Appellant's complaint alleges, in substance, that he was not afforded due process in the revocation of his parole and that appellees conspired with appellant's wife to deprive him of his liberty. The complaint also alleges claims of defamation, false imprisonment and fraud.

The district court dismissed the complaint on August 12, 1966 (CT 96-97). The court stated:

"Plaintiff previously filed in this court a petition for a writ of habeas corpus based substantially on the same allegations which appear in his present complaint. On December 14, 1964, this court denied the petition for a writ of habeas corpus because these allegations were not sufficient to indicate any violation of Williams' federal rights. Williams v. California Adult Authority, No. 43101 (N.D.Cal. 1964). See Harris v. Ragen, 81 F.Supp. 608 (N.D.Ill. 1949), aff'd. 177 F.2d 303 (7th Cir.). After careful examination of the complaint (treating it

as claimig different rights on a different basis than the petition for habeas corpus), the court finds no allegation of violation of rights under the Constitution or statutes of the United States. Therefore, plaintiff states no cause of action under 42 U.S.C. § 1983 nor under 42 U.S.C. § 1985. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert. den. 376 U.S. 920." (CT 97).

The court did not pass on the merits, if any, of appellant's claims of defamation, false imprisonment and fraud (CT 97). The court stated that these matters might be raised under state law in the state courts (CT 97).

On August 25, 1966, appellant filed a notice of appeal (CT 116-132).

APPELLANT'S CONTENTIONS

1. The district court erred in dismissing the complaint where the appellant can prove facts in support of his claim which would entitle him to relief.

2. The district court committed procedural errors in dismissing the complaint.

SUMMARY OF APPELLEES' ARGUMENT

I. The actions of appellees Harris and Nissen in recommending the cancellation and revocation of appellant's parole did not violate any federal constitutional provision or any federal law.

II. The action of the California Adult Authority in cancelling and revoking appellant's parole did not violate any federal constitutional provision or federal law.

III. Appellant's allegations of defamation, false imprisonment and fraud did not raise any issues cognizable under the Federal Civil Rights Act.

IV. There were no procedural defects in the order of dismissal.

ARGUMENT

I.

THE ACTIONS OF APPELLEES HARRIS AND
NISSEN IN RECOMMENDING THE CANCELLATION
AND REVOCATION OF APPELLANT'S PAROLE
DID NOT VIOLATE ANY FEDERAL CONSTITU-
TIONAL PROVISION OR ANY FEDERAL LAW

On June 6, 1962, appellee California Adult Authority granted appellant the privilege of parole (CT 79). On July 16, 1962, appellant duly executed an agreement of parole, and on the following day was released from physical custody into the constructive custody of the Adult Parole Division (CT 79). He was placed under the supervision of the Huntington Park District Office where appellee T. R.

Nissen was supervisor and appellee David L. Harris was parole agent (CT 86).

On August 13, 1962, appellant's wife reported that appellant had gone "berserk" and had destroyed personal property in her home (CT 80). She feared for her life (CT 80). Acting on this information, Harris arrested appellant pursuant to the authority conferred upon him by California Penal Code section 3056 (CT 80). The next day Harris checked the wife's home very closely and confirmed the fact that extensive damage and destruction had occurred (CT 80-81). He also contacted appellant who denied destroying any part of the home but admitted that he was in the house at the time of the incident, was aware of the damage done, and did not report the matter to the police (CT 81). After completing the investigation, Harris recommended cancellation of the parole (CT 82). Nissen approved the recommendation (CT 83).

Appellant, in his complaint, claimed that his constitutional rights had been infringed by the actions of Harris and Nissen. Apparently, appellant demands that the recommendations of the parole officers be based upon the results of some formal inquiry of an adversary nature, or some judicial determination of his guilt to the charge of destroying his wife's property.

In the absence of a statute requiring a hearing, there is no constitutional right to a hearing on the breach

of conditions of parole or probation. Escoe v. Zerbst. 205 U.S. 490, 492 (1935); Linton v. Cox, 358 F.2d 859, 862 (10th Cir. 1966). There is no constitutional infirmity in the retaking of a parolee who is accused of a violation of parole. Richardson v. Markley, 339 F.2d 967, 969 (7th Cir. 1965). Parole is a matter of grace and not of right. Hyser v. Reed, 318 F.2d 225, 233 (D.C. Cir. 1963). In Jones v. Cunningham, 371 U.S. 236, 242 (1963), the court recognized the power of a parole officer to confine a parolee he believes has violated a term or condition of parole.

In the instant case, parole agent Harris thoroughly investigated the incident which gave rise to the parole violation charge, including in his investigation an interview with appellant (CT 80-82). In his final evaluation, Harris concluded that appellant's failure to report the incident to police demonstrated his poor attitude and lack of cooperation. In addition, there was strong circumstantial evidence that appellant had, in fact, inflicted the damage on his wife's property. The assertions that Harris ignored appellant's denial of guilt or did not consider the wife's veracity, do not show that Harris violated any constitutional right of appellant. The conditional liberty of parolees is an attempt at rehabilitation and the progress of that attempt should be measured "by the considered judgment of those who make it their professional

business." Jones v. Rivers, 338 F.2d 862, 874 (4th Cir. 1964).

II.

THE ACTION OF THE CALIFORNIA ADULT AUTHORITY
IN CANCELLING AND REVOKING APPELLANT'S
PAROLE DID NOT VIOLATE ANY FEDERAL CONSTI-
TUTIONAL PROVISION OR FEDERAL LAW

Upon the recommendation of the Adult Parole Division, the California Adult Authority cancelled appellant's parole and he was returned to state prison (CT 85-86). At state prison he was afforded a hearing on the charge against him and was found guilty (CT 84). Parole was revoked (CT 84).

In his complaint, appellant asserted a right to an adversary hearing on the issue of parole violation, apparently with the right to counsel, the right to present witnesses, and the right to confront the witnesses against him.

Where a hearing is granted, as in appellant's case, such hearing need not be converted into an adversary proceeding. Hyser v. Reed, supra, 318 F.2d 225, 233 (D.C. Cir. 1963), cert. denied 375 U.S. 957. Parole is a privilege and not a right, and the revocation of parole, like the granting of it in the first instance, does not require a full dress trial with the right to counsel, the right to summon witnesses, and the right to confront witnesses. United States v. Kenton, 190 F. Supp. 689, 691 (D.Conn. 1960)

The right to counsel is clearly not applicable. In Washington v. Hagen, 287 F.2d 332, 334 (3d Cir. 1960), cert. denied 366 U.S. 970 (1961), the court said: "So long as the judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole." See also, Martin v. United States Board of Parole, 199 F. Supp. 542, 543 (D.C. 1961); Hock v. Hagen, 190 F. Supp. 749, 751 (M.D. Penna. 1960); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959).

A parolee has no constitutional right to present witnesses at a hearing, or to confront his accusers and to cross-examine them. Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Poole v. Stevens, 190 F. Supp. 938, 939 (E.D. Mich. 1960). Here, appellant was afforded an administrative hearing and there is no basis for asserting that that hearing was inadequate or unfair. See Collins v. Klinger, 332 F.2d 54, 58 (9th Cir. 1964).

Appellant's contention that his reconfinement was unlawful because of the time lapse between his arrest (August 13, 1962) and the date of the official revocation (November 19, 1962) is without merit. Letellier v. Taylor, 348 F.2d 893, 894 (10th Cir. 1965).

In People v. Ragen, 81 F.Supp. 608, 610 (N.D. Ill. 1949), affirmed 177 F.2d 303 (7th Cir. 1949), the court stated:

"The administration of the parole law is the exercise through an executive branch of the government, of the state's power to keep safely, supervise and discipline its prisoners. Such matters are not judicial, but are matters of prison discipline. Quite obviously, then, a court has no authority to interfere unless the administrative body has acted arbitrarily or capriciously. And this power is even more stringently limited where a federal court is called upon to review the acts and decisions of an administrative agency of a sovereign state."

Since appellant concedes that his commitment is valid and since he is presently serving his sentence pursuant to that commitment, his attack on the validity of the order revoking his parole presented no federal question which might have entitled him to damages under the Civil Rights Act. See In re Costello, 262 F.2d 214 (9th Cir. 1958).

III.

APPELLANT'S ALLEGATIONS OF DEFAMATION, FALSE IMPRISONMENT AND FRAUD DID NOT RAISE ANY ISSUES COGNIZABLE UNDER THE FEDERAL CIVIL RIGHTS ACT

Appellant urged in his complaint that the appellees, by acting to revoke his parole, defamed his character, committed fraud and deceit, and caused his false imprisonment. The district court, without reaching the merits of

these claims, properly held that they were questions for the civil courts of the state and not matters upon which the federal courts had jurisdiction under the Civil Rights Act (CT 97). See Agnew v. City of Compton, 239 F.2d 226, 232 (9th Cir. 1957).

IV.

THERE WERE NO PROCEDURAL DEFECTS IN THE ORDER OF DISMISSAL

Appellant's brief attempts to raise a series of procedural questions. They may be disposed of briefly:

1. Can the district court dismiss the complaint on its own motion without holding a hearing?

This is not an issue because the complaint was dismissed on the motion of appellees and a hearing was held.

2. Can the district court dismiss the complaint without leave to amend?

Yes. Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962)

3. Can the district court dismiss the complaint without first viewing the reply submitted by appellant in opposition to the motion to dismiss?

The motion to dismiss was noticed on July 25, 1966 (CT 72). It was heard on August 8, 1966 (CT 72). The complaint was dismissed on August 12, 1966 (CT 96-97). A note on the order of dismissal indicates that copies were mailed that date (CT 96). A reply to the motion to dismiss, dated August 15, 1966, was filed by appellant on

August 18, 1966 (CT 98-113). It is evident that appellant had ample time to reply prior to the hearing and prior to the issuance of the order of dismissal. He made no application for an extension of time.

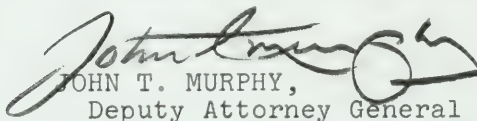
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing the complaint for damages should be affirmed.

Dated: December 5, 1966.

THOMAS C. LYNCH, Attorney General
of California,

ROBERT R. GRANUCCI,
Deputy Attorney General


JOHN T. MURPHY,
Deputy Attorney General

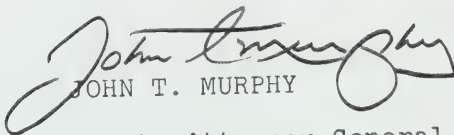
Attorneys for Appellees.

rcg
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66-770

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: December 5, 1966.


JOHN T. MURPHY

Deputy Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. RICARDO SALAS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

BRIEF FOR THE APPELLEE

CARL EARDLEY,
Acting Assistant Attorney General

JAMES P. ALGER,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21401

G. RICARDO SALAS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was brought by appellant, as a citizen, resident and taxpayer of the Territory of Guam, on behalf of himself and all other citizens, residents and taxpayers of Guam, for the purpose of asserting an alleged contractual claim possessed by the Government of Guam against the United States which that Government, it is alleged, has taken no action to enforce. (R. 1-4). The district court dismissed the complaint. (R. 1-4). The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2), and under Section 22(a) of the Organic Act of Guam, 48 U.S.C. 1424(a). This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant brought this suit in his capacity as a citizen, elector, resident, and taxpayer of the Territory of Guam, on behalf of himself and all other citizens, electors, residents, and taxpayers of Guam. (R. 2). Appellant alleges that since the passage of the Organic Act of Guam on August 1, 1950, the Government of Guam has spent in excess of \$10 million for transportation and housing of officers and employees of the Government of Guam whose homes when hired were off the island. This suit, filed on June 9, 1966, seeks recovery of this sum from the United States for the benefit of the Government of Guam. It is alleged that the Government of Guam has taken no action to recover the expense and that a demand upon it to take such action would be useless. (R. 3). Appellant also seeks an award of attorneys' fees from the fund to be created by the action. Ibid.

Appellant alleges that the Government of Guam is entitled to recover its expenditures for transportation and housing of its employees on the basis of Section 26(c) of the Organic Act of Guam, 48 U.S.C. 1421d(c). That Section provides that "officers and employees of the government of Guam shall, if their homes be outside Guam, be entitled to transportation at the expense of the United States * * * from their homes to Guam upon their appointment and from Guam to their homes upon completion of their duties * * * [and] shall each be entitled to receive appropriate quarters to be furnished by the United States at

established rentals." Since fiscal 1953, Congress has not appropriated funds to meet these expenses. ^{1/}

The district court dismissed the complaint on the ground that it lacked jurisdiction under the Tucker Act. This appeal followed.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a), provides in relevant part as follows:

The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 26(c) of the Organic Act of Guam, 48 U.S.C. 1421d(c), provides in relevant part as follows:

All officers and employees of the government of Guam shall, if their homes be outside Guam, be entitled to transportation at the expense of the United States for themselves, their immediate families, and their household effects, from their homes to Guam upon their appointment and from Guam to their homes upon completion of their duties: Provided, That such transportation other than that incident to initial appointment shall not be required to be furnished

1/ The Department of the Interior has taken the position that Congress is obligated under the Organic Act to appropriate these funds (R. 31). However, contrary to appellant's assertion (brief, p. 6), this does not constitute an admission that, in face of Congress' refusal to appropriate the funds, the United States is liable in this action.

unless they shall have served in Guam for at least two years, unless separated for reasons beyond their control. * * * During their term of duty in Guam they shall each be entitled to receive appropriate quarters to be furnished by the United States at established rentals.

ARGUMENT

I. THE DISTRICT COURT HAD NO JURISDICTION IN THIS ACTION TO ADJUDICATE A CLAIM OF THE GOVERNMENT OF GUAM

This action is based on a claim of the Government of Guam. That Government -- not appellant -- has paid transportation and housing expenses of its employees, and that Government -- not appellant -- is allegedly entitled to reimbursement from the United States. Any recovery in this action would be paid to the Government of Guam, not to appellant. We shall now demonstrate (1) that appellant's status as a citizen and taxpayer of Guam does not entitle him to act as a private attorney general in bringing a civil action on behalf of the Government of Guam, and (2) that in any event, appellant cannot obtain an adjudication with respect to a claim of the Government of Guam in an action to which that Government is not a party.

1. Appellant is not authorized to bring a suit on behalf of the Government of Guam.

The Organic Act of Guam vests the executive authority of the Government of Guam in the Governor of Guam, who is given "general supervision and control of all executive agencies and instrumentalities of the government of Guam." 48 U.S.C. 1422. The Government Code of Guam creates a Department of Law which is

administered by the Attorney General of Guam and has "cognizance of all legal matters in which the government of Guam is in any-wise interested." Government Code, Sections 7000, 7001.^{2/} Accordingly, the Governor of Guam, acting through the Attorney General, has exclusive authority to bring civil suits on behalf of the Government of Guam. This authority is not vested in appellant.

It is well established that the Attorney General of the United States has absolute discretion to refuse to bring litigation on behalf of the Federal Government, or to dismiss such litigation once brought, despite the objections of private persons whose interests are affected. Confiscation Cases, 7 Wall. (74 U.S.) 454; Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y.). The Attorney General of Guam has similar authority with respect to claims belonging to the Government of Guam.

2/ These Sections provide:

§ 7000. Attorney General. The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor of Guam, with the advice and consent of the Legislature, and shall be subject to removal by the Governor.

§ 7001. Department of Law, cognizance. The Department of Law shall have cognizance of all legal matters in which the government of Guam is in anywise interested. It shall have cognizance of all matters pertaining to public prosecution. For this purpose the Island Attorney, deputy Island Attorneys and all employees of the Island Attorney's office shall form the prosecution division of the Department of Law and are placed under the jurisdiction of the Attorney General.

Appellant's suit is not sustainable on the authority of cases permitting municipal taxpayers to sue on behalf of the municipality where the municipality has refused to bring suit, or the cases permitting stockholders to sue on behalf of the corporation where the directors have refused to sue. In the first place, appellant is confronted here with statutes vesting the executive authority of the Government of Guam in the Governor with authority to act in legal matters vested in the Attorney General. Moreover, even if the statutes are disregarded, the authorities regarding municipalities and corporations do not support appellant's position. In the case of stockholders' derivative suits, the stockholder must either show that the directors' refusal to sue results from self-dealing (as in the typical case where the suit is against directors or officers), or that their refusal to sue is fraudulent for some other reason.

Solomont & Sons Trust v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E. 2d 241 (1950)^{3/}; Brooks v. Brooks Pontiac, Inc., 143 Mont. 256, 389 P. 2d 185 (1964)^{4/}. A similar rule

3/ "Intelligent and honest men differ upon questions of business policy. It is not always best to insist upon all one's rights; and a corporation * * * may properly refuse to bring a suit which one of its stockholders believes should be prosecuted." 326 Mass. at 112, 93 N.E. 2d at 248.

4/ "The mere fact that a corporation has a cause of action for an injury does not always make it incumbent upon it to sue, any more than in the case of an individual. If, in the opinion of the directors or a majority of the stockholders, the best interests of the company do not require it to sue, it need not do so. The matter ordinarily is within their discretion, and if they act in good faith, their refusal to sue violates no right of dissenting stockholders, so as to entitle them to maintain a suit in their own behalf. The exercise of such discretion by the directors will not be lightly set aside by the court, and where a stockholder complains of such action of the directors the court will consider the circumstances, and, if no bad faith is shown, will decline to substitute the judgment of the stockholder for that of the managing directors." 143 Mont. at 260, 389 P. 2d at 187.

prevails in states where a taxpayer is allowed to sue on behalf of a municipality: the suit is allowed only where self-dealing is involved, or the refusal by the municipality to sue is otherwise fraudulent. Tucker v. Edwards, 214 La. 560, 38 So. 2d 241, 243 (1948).

Appellant's complaint in this case alleges neither self-dealing nor fraud, but merely asserts that the Government of Guam has a cause of action which it has failed to prosecute. In effect, appellant asserts that a government must bring a lawsuit whenever it has a cause of action, and if it does not, a taxpayer may bring suit on its behalf. We know of no authority to support this proposition.

There are several reasons why the Government of Guam might reasonably conclude that this suit should not be brought. It might well have thought that Congress' continued failure to appropriate funds to pay for transportation and housing expenses of Guam Government employees was deliberate^{5/} and as a consequence effected a pro tanto repeal of the statute creating the obligation. Cf. United States v. Dickerson, 310 U.S. 554; Sutton v. United States, 256 U.S. 575. Moreover, in the face of a deliberate refusal to appropriate funds, the Government of Guam might have

5/ The annual appropriations for the Department of the Interior since 1953 have included funds for other obligations of the United States under the Organic Act of Guam, but not for transportation and housing of employees. 66 Stat. 457; 67 Stat. 273; 68 Stat. 372; 69 Stat. 149; 70 Stat. 264; 71 Stat. 265; 72 Stat. 163; 73 Stat. 100; 74 Stat. 112; 75 Stat. 250; 76 Stat. 339; 77 Stat. 102; 78 Stat. 278; 79 Stat. 179.

thought that to press the claim -- even if it were valid -- would jeopardize other congressional appropriations for the benefit of Guam.^{6/} Indeed, the legislative history of Sections 30 and 31 of the Organic Act, 48 U.S.C. 1421h and 1421i -- which provide that the federal income tax is applicable in Guam and that the proceeds are payable to the Treasury of Guam -- shows that Congress intended that, as Guam became self-supporting, it would no longer need appropriations from the Federal Treasury. 96 Cong. Rec. 7577 (May 23, 1950, Reps. Peterson, Miller and Scrivner).^{7/} And finally, the Government of Guam may have

6/ Appellant introduced in the district court a letter from an Assistant Secretary of the Interior regarding funds for transportation and housing of off-island employees. The letter states (R. 31): "The first civilian Governor of Guam, Mr. Carlton Skinner, has testified that he did not seek such funds from the Congress because, in his judgment, such action might have jeopardized Guam's retaining other more valuable fiscal benefits also conveyed by the Organic Act."

7/ In 1950, when the Organic Act was passed, Guam was not self-supporting, and deficits in its budget had to be met by funds from the federal treasury. S. Rep. No. 2109, 81st Cong., 2d Sess., at 6. It was believed, however, that Guam would become self-supporting within two years. *Id.*, at 15. General appropriations for support of the local government were made in 1951 and 1952, 64 Stat. 694, 65 Stat. 262, and the United States in those years paid the expenses of transportation and housing for off-island employees of the Guam Government. (R. 31) In subsequent years, these appropriations were not made. See appropriation acts cited in note 5, *supra*. In 1966, the House Committee on Interior and Insular Affairs, in reporting favorably a bill to provide for popular election of the Governor of Guam, stated: "Except in such emergency cases as the one caused by Typhoon Karen in November 1962, virtually all of the expenses of the government of Guam are borne locally and the expenditure of Guam's tax revenues is fully under local control." H.R. Rep. No. 1520, 89th Cong., 2d Sess., at 4.

concluded that it, rather than the United States, has the primary obligation to pay for transportation and housing of its own off-island employees, and that the United States is merely in the position of surety if the Government of Guam fails to meet its primary obligation to its own employees. This conclusion would be supported by the language of the statute, which confers a right in officers and employees of the Government of Guam to be reimbursed by the United States for housing and transportation expenses, but does not state that the Government of Guam may recover from the United States if it assumes these expenses. Indeed, in 1964, the Legislature of Guam recognized the primary obligation of the Government of Guam to provide for transportation expenses of its off-island employees. Government Code, Section 4110.^{8/}

We are, of course, not privy to the internal deliberations of the Government of Guam. But that Government has sued the United States in the past. Government of Guam v. Federal Maritime Commission and United States, 329 F. 2d 251 (C.A.D.C.). There is no reason to believe that it would not do so again if it believed that a suit was in the best interests of Guam.

^{8/} This Section provides in relevant part:

Off-island employees: transportation. Whenever it is necessary to recruit officers or employees from outside Guam, the Governor may provide for transportation of such officer or employee, his dependents, and his household and personal effects, to Guam, and upon completion or termination of his employment, from Guam to his point of recruitment.

* * *

2. The district court could not adjudicate a claim of the Government of Guam in an action to which that Government is not a party.

Even if appellant were entitled to bring this suit, he could not do so unless he made the Government of Guam a party. Just as a corporation is an indispensable party in a stockholder's derivative suit based on a corporate claim against a third party, Moore, 3 Federal Practice, pp. 2379-81, so too is the Government of Guam an indispensable party in an action based on a claim belonging to it. This case involves substantial questions not only as to the basic question of liability under Section 26(c) of the Organic Act, but also as to the amount that would be owing if liability were established -- the Department of the Interior believes the amount would be approximately \$5 million (R. 31, 32, 46, 47), while appellant claims over \$10 million. It would be a violation of due process to bind the Government of Guam on these questions by any judgment in this case, and yet if the Government of Guam were not bound, the United States could be sued again on the same claim.

II. THIS ACTION INVOLVES A SINGLE CLAIM FOR OVER \$10 MILLION AND IS THUS BEYOND THE JURISDICTION OF THE DISTRICT COURT UNDER THE TUCKER ACT.

Appellant relies primarily on the Tucker Act, 28 U.S.C. 1346(a)(2), to establish jurisdiction in the district court to hear this suit against the United States. However, the Tucker Act limits the jurisdiction of district courts in contract cases against the United States to claims "not exceeding \$10,000 in amount * * *." 28 U.S.C. 1346(a)(2). Since the present suit

involves a claim for over \$10 million,^{9/} it does not fall within the jurisdiction of the district court under the Tucker Act.

Appellant attempts to avoid the problem by characterizing his suit as a class action, consisting of separate claims by each citizen, elector, resident and taxpayer of Guam. (R. 2). It is alleged that each separate claim "does not exceed approximately \$200 in amount." Ibid. Reliance is placed on United States v. Louisville & Nashville Railroad Co., 221 F. 2d 698 (C.A. 6), where it was held that 74 claims for freight shipments, each claim amounting to less than \$10,000, were within the jurisdiction of the district court under the Tucker Act and could be joined in a single suit, despite the fact that the total amount of the claims was well over \$10,000. However, in that case, unlike here, the claims could have been brought in separate suits: the consolidation in a single suit was merely for purposes of convenience and did not affect the jurisdiction of the court. As the court pointed out, the complaint sought recovery "on 74 separate and distinct claims for freight alleged to be due on separate and independent shipments, each separate claim being for an amount less than \$10,000 and hence within the jurisdictional limitation of the Tucker Act. * * * The decisive fact is that each claim is founded upon a different contract." 221 F. 2d 698.

9/ A large part of the \$10 million claim is clearly barred by the Tucker Act six-year limitation period, 28 U.S.C. 2401, 2501: appellant seeks recovery for expenditures beginning in 1951 (R. 2, 50), while this action was brought in June, 1966. (R. 1). However, over \$5 million of the claim was spent since 1960. (R. 50).

By contrast, in the present case each citizen, elector, resident, and taxpayer of Guam does not have a separate claim on which a separate suit could be brought. As the district court pointed out, "It is complete and utter fiction to regard this claim as a compilation of fifty thousand separate claims accruing to each citizen of Guam. Assuming it has merit, the claim is owed to the Territory of Guam." (R. 38). Since this is a single claim, it "cannot be divided into separate suits for the purpose of evading the jurisdictional requirements of the Tucker Act." Sutcliffe Storage & Warehouse Co. v. United States, 68 F. Supp. 446, 447 (D. Mass.), aff'd 162 F. 2d 849 (C.A. 1). "The congressional policy is that all large claims must be presented in the one court in Washington, and in every practical sense there is here presented such a large claim." 162 F. 2d at 852.^{10/}

Appellant also bases jurisdiction on Section 22(a) of the Organic Act of Guam, as amended, 48 U.S.C. 1424(a), which provides in relevant part:

The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, [and] shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it * * *.

^{10/} Nor could appellant have brought his case within the \$10,000 limitation by alleging that each expenditure by the Government of Guam for employee transportation and housing expenses gave rise to a separate claim, since this, too, would split the single cause of action. Sutcliffe Storage & Warehouse Co. v. United States, 162 F. 2d 849 (C.A. 1).

While this language extends the jurisdiction of the District Court of Guam beyond that of other federal district courts, the legislative history makes it clear that the statute was intended merely to give the District Court of Guam jurisdiction over certain local cases which federal courts in the states would not have.^{11/} In short, this statute was concerned with allocation of jurisdiction over local cases as between the District Court of Guam and the local Guamanian courts. It was not intended to give the District Court of Guam jurisdiction over federal cases that would otherwise lie exclusively in the Court of Claims, or to expand the waiver of sovereign immunity set forth in the Tucker Act.^{12/}

^{11/} The District Court of Guam is not an Article III court. It was created under Article IV, Section 3 of the Constitution, giving Congress power to regulate the territories. S. Rep. 2109, 81st Cong., 2d Sess., at 12.

^{12/} The judiciary sections of the Organic Act of Guam were drafted in consultation with Judge Albert B. Maris of the Third Circuit Court of Appeals. S. Rep. 2109, 81st Cong., 2d Sess., at 6. In a letter reprinted in the ~~House~~ Committee report, Judge Maris makes the following comment (Ibid., at 12):

It happens that the Virgin Islands are in our circuit and that I have had occasion to observe the business which comes before the district court there. The fact is that the Federal business coming into the court is comparatively small, the bulk of the court's business involving local cases and the whole amount of business, both Federal and local, not providing an excessive workload for one judge.

I would assume that the situation in Guam would be roughly analogous to that in the Virgin Islands and that the case load, both Federal and local, would not likely be much greater. If that is so the creation of a district court to consider Federal cases alone would be quite unjustified and it would be much more appropriate to confer upon the district court jurisdiction over local cases generally or over such local cases as are not assigned by the Guam Legislature to some other court created by it.

(Footnote cont'd)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,


CARL EARDLEY,
Acting Assistant Attorney General

JAMES P. ALGER,
United States Attorney,

ALAN S. ROSENTHAL,
ROBERT V. ZENER,
Attorneys,
Department of Justice,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



ROBERT V. ZENER,
Attorney,
Department of Justice,
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12/ (Footnote cont'd)

The language of Section 22(a) conferring jurisdiction "regardless of the sum or value of the matter in controversy" was added by amendment in 1958. 72 Stat. 178. Both the House Committee report, and a letter from Judge Maris appended to the report, explain that the purpose of this language was to waive the jurisdictional amount required for federal question cases by 28 U.S.C. 1331. H.R. Rep. 951, 85th Cong., 1st Sess., at 1, 7.

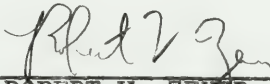
AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

ROBERT V. ZENER, being duly sworn, deposes and says:

That on July 5, 1967, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:


Barrett, Ferenz, Trapp & Gayle, Esquires
W. Scott Barrett, Esquire
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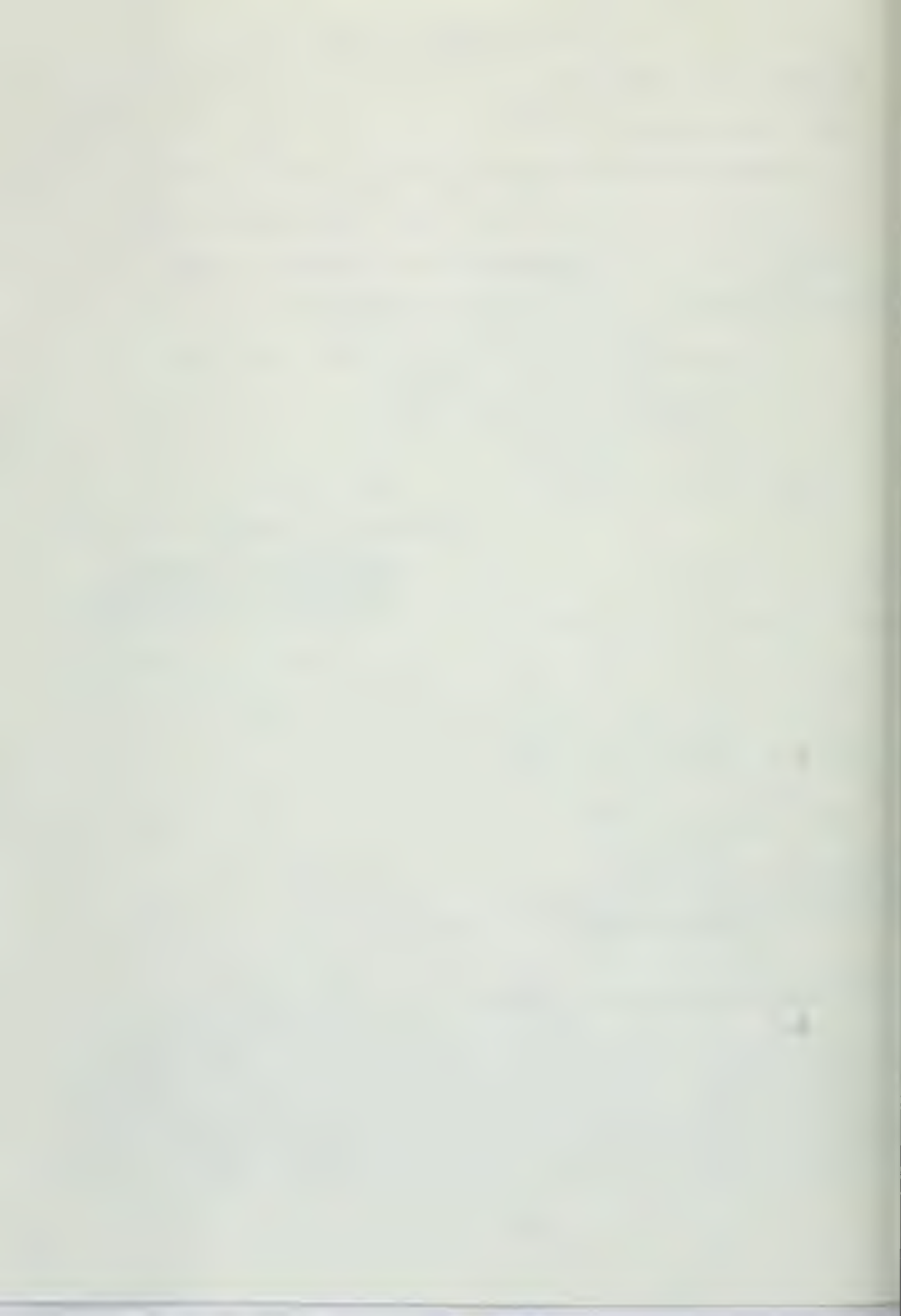
Subscribed and Sworn to before
me this 5th day of July,
1967.

[Seal]



NOTARY PUBLIC

My Commission expires April 14, 1972.



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FOR THE NINTH CIRCUIT

G. RICARDO SALAS,

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SUPPLEMENTAL BRIEF FOR THE APPELLEE

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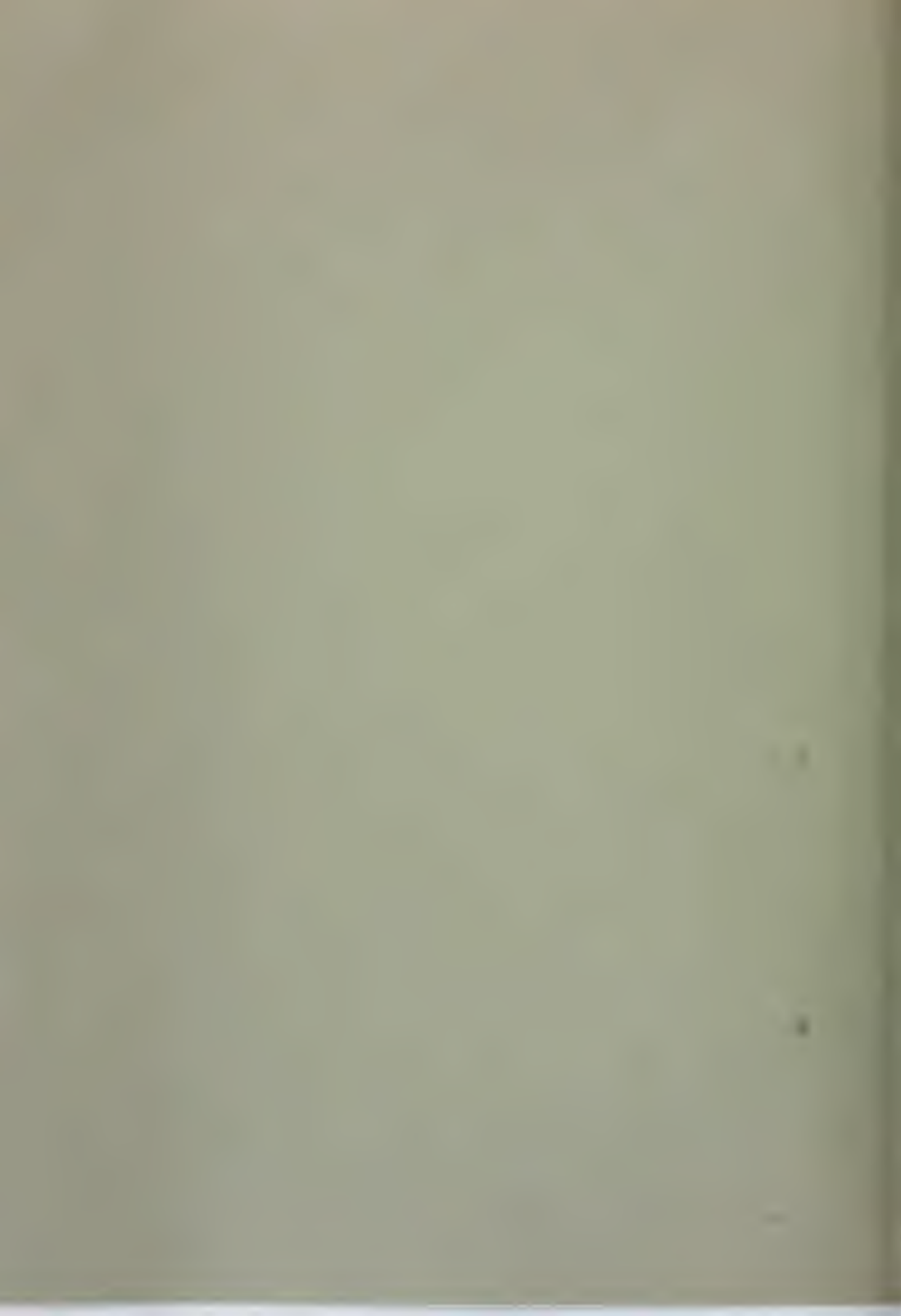
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21401

G. RICARDO SALAS,

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UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

SUPPLEMENTAL BRIEF FOR THE APPELLEE

In our main brief, we argued that the Government of Guam may well have perfectly valid reasons for not bringing suit on a claim that may be legally meritorious, and has the discretion to refrain from suing. Recent events have confirmed that it may be more advantageous for the Government of Guam to seek reimbursement for its employees' moving expenses from Congress rather than the courts. On August 30, 1967, the Senate passed the Guam Development Fund Act of 1967. 113 Cong. Rec. S12559 (daily ed.), August 30, 1967. This Act would authorize the appropriation of \$5,000,000 to establish a revolving fund for loans and loan guarantees to promote the

development of private enterprise and private industry in Guam. A major justification used to support the bill was the fact that Congress had not appropriated funds pursuant to Section 26(c) of the Organic Act to reimburse the Government of Guam for its employees' moving expenses. Thus the report of the Committee on Interior and Insular Affairs on the Guam Development Act, Senate Report 551, 90th Cong., 1st Sess., at 9-10 sets forth a resolution of the Guam legislature which requests Congress "to favorably consider the pending legislation which sets up an economic development fund for the Territory of Guam, and in determining the amount of such fund to consider using the amount the Government of Guam has paid to date in underwriting the off-island transportation costs that are the obligation of the United States * * *."^{1/} A letter from Assistant Secretary of the Interior Anderson to the Chairman of the Senate Committee on Interior and Insular Affairs, in supporting the bill, also pointed out that the failure of Congress to appropriate funds for moving expenses "goes a long way in answering those who might suggest that [the Development Fund Act] is an extraordinary gift for the Government of Guam." Senate Report No. 551, 90th Cong., 1st Sess. at 6. The letter further explained:

^{1/} A copy of this resolution, as reproduced in S.Rep. 551, 90th Cong., 1st Sess. at 9-10, is set forth, infra, at pp. 5-6.

For the past several years the government of Guam, in connection with proposed legislation looking toward the popular election of the Governor of Guam, has taken the position that it is entirely willing to continue to bear the costs chargeable to the United States under the terms of section 26(c), and that it not only would not object to, but recommended the repeal of that section of law. Thus the government of Guam has indicated that it is ready and willing to assume in its own right the burden which it has carried since 1952. Similarly this Department has recommended the repeal of section 26(c) as being consistent with a policy of full local responsibility for local governmental activities comporting with our basic policy of seeking to give the territories the fullest measure of self-government under our Constitution.

While we do not suggest that an enforceable debt is owed the government of Guam by the United States, it does seem to us that in the face of the statutory provisions which have remained in the code for so long, along with the fact that neither this Department nor the federally appointed Governors over the years have sought funds for the purpose specified and that the government of Guam has, even though from necessity, borne this burden with the most modest of complaint, argues persuasively for recognition of these circumstances, and reimbursement in such amount as may be determined to be appropriate. We suggest that such an amount would be \$7 million.

Senate Report No. 551, 90th Cong., 1st Sess., at 7. ^{2/}

The Government of Guam may well feel that it would be more advantageous to obtain economic development legislation rather than to seek a money judgment against the United States.

2/ As we have noted, the amount authorized by the bill as it passed the Senate was, despite the suggestion of the Department of the Interior, \$5,000,000 rather than \$7,000,000.

The Senate has passed legislation which repeals Section 26(c) of the Organic Act of Guam. This is part of the bill which provides for a popular election of the Governor of Guam. S. 449, 90th Cong., 1st Sess., 113 Cong. Rec. S6477 (daily ed.), May 9, 1967.

In any event, the decision as to whether to seek such a judgment belongs to the Government of Guam, not to plaintiff.

Respectfully submitted,

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RESOLUTION NO. 309 OF THE NINTH GUAM LEGISLATURE, 1967
(FIRST), REGULAR SESSION, INTRODUCED BY THE COMMITTEE ON
RESOURCES AND DEVELOPMENT

[Senate Report No. 551, 90th Cong., 1st Sess., at 9-10]

RELATIVE TO RESPECTFULLY PETITIONING AND MEMORIALIZING THE
CONGRESS OF THE UNITED STATES TO ACT FAVORABLY UPON THE
PENDING ECONOMIC DEVELOPMENT FUND BILL FOR THE TERRITORY
OF GUAM, AND IN DECIDING ON THE AMOUNT OF SUCH FUND, TO TAKE
INTO CONSIDERATION THE LOCAL MONEYS SO FAR SPENT ON BEHALF
OF THE FEDERAL OBLIGATION TO TRANSPORT OFF-ISLAND PERSONNEL
TO THE ISLAND AS SET FORTH IN THE ORGANIC ACT OF GUAM

Be it resolved by the Legislature of the Territory of Guam:

Whereas there is now pending before the appropriate committees
of the U.S. Congress, legislation which would set up an economic
development fund to be used by the territory of Guam in developing
its civilian economy now so exclusively dependent upon military
expenditures; and

Whereas the need of such a fund is great, there being many
possibilities for economic development in Guam which either
require costly investigation or long-term investment before
being realized; and

Whereas, in addition, the experience of Taiwan and Okinawa has
demonstrated that when such an economic fund is set up, it serves
as seed money, which germinates growth throughout the economy
and is thus repaid many times over in the way of additional
revenues for both the government and the people; and

Whereas, in setting up such a fund, and in determining the
appropriate amount thereof, the Congress of the United States
might well bear in mind that although section 26(b) of the
Organic Act of Guam (sec. 1421d(c), title 48, United States
Code) requires that the transportation costs of bringing off-
island employees of the government of Guam into and from the
territory be borne by the United States, the government of Guam
has from the inception of civil government absorbed this expense
which has so far totaled approximately \$7 million, which would
therefore appear to be an appropriate and fair sum with which to
set up the economic development fund, representing as it does, a
debt, of sorts, running from the United States to the government
of Guam: Now, therefore, be it

Resolved, That the Ninth Guam Legislature does hereby on behalf of the people of Guam respectfully petition and memorialize the Congress of the United States to favorably consider the pending legislation which sets up an economic development fund for the territory of Guam, and in determining the amount of such fund, to consider using the amount the government of Guam has paid to date in underwriting the off-island transportation costs that are the obligation of the United States; and be it further

Resolved, That the speaker certify to and the legislative secretary attest the adoption hereof and that copies of the same be thereafter transmitted to the President of the Senate, to the Speaker of the House of Representatives, to the chairman of the Senate Interior and Insular Affairs Committee, to the chairman of the House Interior and Insular Affairs Committee, to the Secretary of the Interior, to Guam's Washington representative, and to the Governor of Guam.

Duly and regularly adopted on the 11th day of July 1967.

J. C. ARRIOLA,
Speaker.

F. T. RAMIREZ,
Legislative Secretary.

CERTIFICATE

I certify that, in connection with the preparation of this supplemental brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing supplemental brief is in full compliance with those rules.

Robert V. Zener

ROBERT V. ZENER,
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Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

ROBERT V. ZENER, being duly sworn, deposes and says:

That on the 5th day of October, 1967, he caused three copies of the foregoing supplemental brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

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Subscribed and Sworn to before me this 5th day of October, 1967.

[Seal]

Angeline Johnson
NOTARY PUBLIC

My Commission expires April 14, 1972.

No. 21407

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, AND ITS LOCAL UNION No. 769, RESPONDENTS**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21407

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, AND ITS LOCAL UNION No. 769, RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce an order (R. 125-126),¹ issued against the International Brotherhood of Electrical Workers, AFL-CIO (hereafter the IBEW) and its affiliated Local Union No. 769 (hereafter Local 769), on August 31, 1965 and reported at 154 NLRB 839. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat.

¹ References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the unfair labor practices having occurred at the Glen Canyon Dam Construction site in northern Arizona, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondents violated Section 8(e) of the Act by entering into a contract with Ets-Hokin Corporation (hereafter Ets-Hokin) which provided for the termination of contractual relations by the contracting IBEW local and by all other IBEW locals if Ets-Hokin, a general contractor, subcontracted electrical work to an employer who did not recognize a local of the IBEW. The Board also found that respondents violated Section 8(b)(4)(ii)(A) and (B) by threatening to terminate all contractual relations between Ets-Hokin, the IBEW, and its affiliated locals unless Ets-Hokin ceased doing business with the Rose Construction Company, Phoenix Division (hereafter Rose-Phoenix), a non-IBEW subcontractor. The underlying facts are summarized below:

Ets-Hokin is a general and electrical contractor and does business in various states (R. 46; Tr. 31). At the time of the events in question, Ets-Hokin had contracts with IBEW locals throughout the country containing the following clause or one substantially similar to it (R. 118, 46-47, 68-72; G.C. Ex. 7, p. 9, Tr. 128-131):

The Local Unions are a part of the International Brotherhood of Electrical Workers

and any violation or annulment of working rules or agreements of any other local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this or any other such Local Union by the Employer, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

In October of 1962, Gerald McAllister, a superintendent for Ets-Hokin at a construction project in Glen Canyon, Arizona, entered into a contract with Rose-Phoenix whereby the latter was to construct steel transmission towers and other steel structures (R. 47; Tr. 87). Rose-Phoenix employees came on the project in January of 1963 and, shortly thereafter, executed a collective bargaining agreement with a local of the International Union of Operating Engineers recognizing it as the exclusive bargaining agent and sole source of personnel for the Glen Canyon project (R. 47; Tr. 282, Resp. IBEW Ex. 5).

Within a few days after Rose-Phoenix started on the job, McAllister received a phone call from Joe Housley, Business Representative of respondent Local 769. Housley informed McAllister that Ets-Hokin was in violation of its IBEW contract because there was a non-IBEW subcontractor on the job (R. 48; Tr. 89-92). McAllister told Housley to contact Ets-Hokin's San Francisco Office (Tr. 92). In a

letter dated February 1, 1963, Housley wrote to Ets-Hokin in San Francisco and, quoting a clause similar to that set out *supra*, pp. 2-3, reiterated that Ets-Hokin was in violation of its IBEW contract and that he, Housley, had asked the International to cancel that contract (R. 48; GC Exh. 8).²

On or about February 8, 1963, representatives of both Local 769 and IBEW met with McAllister and advised him that Rose-Phoenix did not have an IBEW contract, was not eligible for one, and therefore must be removed from the Glen Canyon project if Ets-Hokin was to avoid termination of its IBEW agreements (R. 49; Tr. 94-96). In a subsequent telephone call, Local 769 representative Housley reiterated to McAllister that Ets-Hokin would have to comply. McAllister replied that he needed time to straighten things out and Housley agreed to speak to IBEW representatives about giving Ets-Hokin 5 or 10 days to bring itself into compliance (R. 51; Tr. 97-98).

At the same time, other representatives of the respondents were placing similar pressure on the contractor's President, Jeremy Ets-Hokin. In January 1963, IBEW Vice-President Foehn told President Ets-Hokin that Ets-Hokin was "not in the best graces" of the IBEW President because of the Rose-Phoenix problem and that termination of its international agreement was an imminent possibility (R. 51; Tr.

² At this time, Ets-Hokin had no contractual relations with Local 769. However, Housley referred to a contract between Ets-Hokin and Local 640, the predecessor of Local 769 in the Glen Canyon area (R. 47, 123, n. 14; Tr. 82, GC Ex. 8).

25-29). On February 26, 1963, IBEW President Freeman wrote Jeremy Ets-Hokin, again detailing the clause providing for termination of all IBEW contracts in the event of any subcontracting to non-IBEW subcontractors and informing him that he was said to be in violation of that clause (R. 48; GC Ex 4). In late March of 1963, Jeremy Ets-Hokin had a phone conversation with IBEW President Freeman. Referring to the Glen Canyon work being performed by Rose-Phoenix, Freeman stated that "it's our work" (Tr. 39), that Ets-Hokin had been given enough time to straighten matters out, and that he could have only 24 hours more to live up to his IBEW agreement or else the IBEW contracts would be terminated (R. 52; Tr. 35-39, 63). Freeman was persuaded to give Ets-Hokin one final week to bring himself into compliance (R. 52; Tr. 37).

Shortly thereafter, Jeremy Ets-Hokin informed Rose-Phoenix officials that he had no alternative but to terminate contractual relations with them because he was in jeopardy of losing his agreement with IBEW (R. 52; Tr. 50-52, 269-270).³

Subsequent to the termination of Rose-Phoenix, Ets-Hokin performed the previously subcontracted work itself using employees hired through the Local 769 hiring hall (R. 53; Tr. 59). Ets-Hokin also entered into a contract with Local 769 which contained the typical clause quoted *supra*, pp. 2-3, proscribing

³ Ets-Hokin and Rose-Phoenix entered into a settlement which terminated their contractual relationship. Rose-Phoenix received \$50,000 as consideration for entering into this settlement as well as a "generous" price for the equipment which Ets-Hokin purchased from it (R. 52; Tr. 273, Ets-Hokin Ex 1-B).

subcontracting to a non-IBEW subcontractor and providing for termination in the event of the breach of that proscription (R. 53; GC Ex 6, GC Ex 7, p. 9).

II. The Board's conclusions and order

Upon the foregoing facts, the Board found that so much of the IBEW contract as precluded Ets-Hokin from subcontracting to non-IBEW contractors violated the general proscription of Section 8(e) but was saved from illegality because of the construction industry proviso to that Section.⁴ The Board, however, found violative of Section 8(e) those portions of the clause which purported to give IBEW and its locals the right cancel this and all other IBEW contracts with Ets-Hokin in the event of a breach of the subcontracting restriction. The Board viewed the termination provisions as a form of self-help which coerced adherence to the subcontracting provision. As such, the Board ruled, the termination provisions were not protected by the proviso since it was Congress' intent that secondary contractual restrictions, illegal under

⁴ The provision reads, in relevant part:

"* * * provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *"

The Trial Examiner had found that the restriction in the contract on subcontracting to non-IBEW companies was not saved by this proviso because the clause was not, in terms, limited to on-site construction work (R. 54-56). The Board ruled that such limitation need not appear on the face of the contract, but that where, as here, the evidence showed that application was intended to be limited to on-site work, the clause was within the proviso (R. 119-120).

Section 8(e) but for the proviso, were to be enforced only through judicial action and not by conduct proscribed by Section 8(b)(4)(B) (R. 120-122, 133-134). The Board further found that respondents violated Section 8(b)(4)(ii)(A) by threatening Ets-Hokin with termination of its IBEW agreements with the object of forcing Ets-Hokin to enter into an agreement prohibited by Section 8(e) of the Act (R. 123). Finally, the Board found that by threatening to cancel its contracts with Ets-Hokin, respondents violated Section 8(b)(4)(ii)(B) since the object of that coercion was to cause Ets-Hokin to cease doing business with Rose-Phoenix (R. 123-124).⁵ Accordingly, the Board ordered respondents to cease and desist from entering into, maintaining, or enforcing the termination and sympathetic action portions of the subcontracting clause in their collective bargaining agreements. Furthermore, the Board ordered respondents to cease and desist from threatening, coercing or restraining Ets-Hokin or any other person to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any

⁵ The Board reversed the Trial Examiner's finding that Ets-Hokin also violated Section 8(e) in view of the fact that neither the charge nor the complaint alleged a violation of that section by Ets-Hokin (R. 122, 3-4, 9, 14, 16-23).

Furthermore, the Board reversed the Trial Examiner's finding that both the respondent unions and Ets-Hokin were guilty of violating Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) respectively by causing the termination of Rose-Phoenix's employees. The Board ruled that the lawful subcontracting clause was severable from the unlawful termination clause and that the unions had the right to insist, although not by proscribed means, that Ets-Hokin terminate its contract with Rose-Phoenix, which was a non-IBEW contractor. Accord-

dant
: Cruz

other person. Finally, respondents were directed to post appropriate notices (R. 125-126).⁶

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(b)(4)(ii)(B) of the Act by coercing Ets-Hokin with an object of forcing or requiring it to cease doing business with Rose-Phoenix

Section 8(b)(4)(B) of the Act provides, in relevant part, that it is an unfair labor practice for a labor organization or its agents:

(ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

A Section 8(b)(4)(ii)(B) violation therefore requires two elements: (1) a labor organization or its

ingly, in terminating Rose-Phoenix's employees in accordance with the lawful restrictive subcontracting clause, Ets-Hokin did not violate Section 8(a)(1) and (3) of the Act; and, in insisting that Ets-Hokin adhere to this lawful contract provision, the respondent unions did not cause Ets-Hokin to unlawfully discriminate in violation of Section 8(b)(2) and (1)(A) (R. 125).

The Board's action in dismissing portions of the complaint is not challenged in this proceeding.

⁶ Member Fanning concurred in so much of the Board's Decision and Order as dismissed the alleged violations of Section 8(a)(3) and Section 8(b)(2). He dissented as to the remaining portion and would have dismissed the complaint in its entirety (R. 127-131).

agents must "threaten, coerce or restrain" an employer; and (2) an object of its conduct must be the cessation of business between two employers.

In the instant case, there can be little question concerning the latter element. As detailed, *supra*, pp. 3-5, representatives of both respondents made no secret of the fact that their displeasure with Ets-Hokin stemmed from its subcontracting arrangement with Rose-Phoenix. Ets-Hokin was said to be in violation of its IBEW contracts solely because it was doing business with Rose-Phoenix, a contractor who was characterized as being non-IBEW and ineligible to become an IBEW contractor. It was obvious to all concerned that only the cessation of business between Ets-Hokin and Rose-Phoenix would satisfy respondents.⁷

Nor can there be any doubt that respondents' threat to cancel all IBEW contracts with Ets-Hokin constitutes "coercion" within the meaning of the Act.

⁷ Before the Board, respondents contended that the reason they threatened to terminate the IBEW contracts was because Ets-Hokin had breached an implied condition of these contracts by subcontracting to Rose-Phoenix, whose wage scale was allegedly below the rates set up pursuant to the Davis-Bacon Act. However, there is substantial evidence to support the Board's finding (R. 122-123) that this was not the sole, nor even the main reason for respondents' threat. Respondents insisted that only the removal of Rose-Phoenix could satisfactorily resolve the dispute (R. 123; Tr. 46, 95-96, 102-203). It is not necessary to find that respondents' sole object was unlawful. Rather, it is sufficient if substantial evidence supports the finding that one of the objects was unlawful. *N.L.R.B. v. Amalgamated Lithographers*, 309 F. 2d 31, 43-44 (CA 9); *Dep't & Specialty Store Employees' Union v. Brown*, 284 Fed 619, 628 (CA 9).

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The prohibition of the secondary boycott provisions of the Act extends beyond force, violence and picketing as a means of bringing pressure against the neutral secondary employer. Thus, Representative Griffin, in analyzing the new Section 8(b)(4)(ii)(B) stated that it would be illegal for a union to threaten a secondary employer "with labor trouble or other consequences" in order to induce him to cease doing business with the primary employer. II Leg. Hist. 1568.⁸ Elsewhere he referred to the means prohibited as including threatening the secondary employer "*with a strike or other economic retaliation*". II Leg. Hist. 1523, emphasis supplied. See also, *N.L.R.B. v. Local 825, Operating Engineers*, 315 F. 2d 695, 697-698 (C.A. 3); *N.L.R.B. v. Highway Truckdrivers & Helpers, Local No. 107*, 300 F. 2d 317, 320-321 (C.A. 3). As the Supreme Court has noted, "the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise". *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits)*, 377 U.S. 58, 68.

The coercive nature of respondents' conduct is clear. The real meaning of the repeated threats to terminate IBEW contracts was spelled out by IBEW in its brief to the Board:

Because the so-called annulment clause contained in the IBEW's contract with Ets-Hokin

⁸ "Leg. Hist." refers to Legislative History of the Labor-Management Relations Reporting and Disclosure Act of 1959 (G.P.O., 1959).

was repeated in the union's agreements with other contractors, cancellation of the Ets-Hokin agreement would have immediately made that company an ineligible business associate in the eyes of these other contractors. Thus, whether or not the union continued to refer workmen to Ets-Hokin, the mere fact that the latter had no agreement with the IBEW would have placed Ets-Hokin in a position where other contractors wishing to comply with their own IBEW agreements would not have made contracts with Ets-Hokin. Under such circumstances, there was no motivation for the union to take the strike action the General Counsel considers inevitable.

In short, the effect of termination of the IBEW agreements was likely to be the economic extinction of Ets-Hokin. Termination would have made Ets-Hokin a pariah in the construction industry—an "ineligible business associate" to be avoided by other contractors anxious to remain free of the contamination of labor trouble. Thus, Ets-Hokin was threatened by economic action potentially more devastating than either a strike or a refusal to refer employees under a hiring hall arrangement. Since a threat to take either of these latter steps is "coercive" within the meaning of Section 8(b)(4)(ii) (e.g., *N.L.R.B. v. Dist. Council of Painters No. 48*, 340 F. 2d 107, 110-111 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B. v. Local 825, Operating Engineers, supra*, 315 F. 2d at 697-698), it follows that the threat to terminate Ets-

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Hokin's IBEW contracts is also a prohibited means of attaining a secondary goal.⁹

Before the Board, respondents relied upon *Sheet Metal Workers v. Hardy Corp.*, 332 F. 2d 682 (C.A.

⁹ Local 769 contended before the Board that it should not be held to have violated Section 8(b)(4) even if threats to terminate are "coercive." It argued that under the IBEW constitution, a local does not have power to terminate a contract but only to recommend such action to the International and, therefore, it cannot be held to have coerced Ets-Hokin because Ets-Hokin knew of this limitation on Local 769's power. However, it is undeniable that Local 769 combined with respondent IBEW in a joint effort to remove Rose-Phoenix from the construction project. It was the business representative of Local 769 who made the protest that first brought IBEW into the case and Local 769's representatives participated in the various meetings between IBEW and Ets-Hokin described *supra* pp. 3-5. Moreover, the beneficiary of Rose-Phoenix's removal was Local 769, since subsequent to the removal Ets-Hokin entered into a contract with it and thereafter the workers who performed the construction work which would have been done by Rose-Phoenix's employees were referred by Local 769 through its hiring hall (*supra*, p. 5). Finally, this and other local contracts contain the usual recitation that the particular local "is a part of the International" and a breach of one local's contract warrants termination of all IBEW contracts (G.C. Ex. 7, p. 9). Thus substantial evidence supports the Board's finding (R. 124, 53-54) that respondents shared a common objective of obtaining work for IBEW members who belonged to Local 769, and that they worked in concert to obtain this goal. It is well settled that the general rules of agency law apply in cases arising under the Act. *N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union, Local 10*, 283 F. 2d 558, 563 (C.A. 9) and authorities there cited. And, the Supreme Court has held that joint venturers are the agents of each other and thereby responsible for the other's conduct. *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229, 249. Accord: *Int'l Org. of Masters, Mates & Pilots v. N.L.R.B.*, 351 F. 2d 771, 777-778 (C.A.D.C.). See also *Int'l Longshoremen's & Warehousemen's, etc. v. Juneau Spruce Corp.*, 189 F. 2d 177, 190 (C.A. 9),

5), in support of their contention that the threat to terminate was not coercive within the meaning of Section 8(b)(4). We submit, however, that the *Hardy* case supports the Board's position rather than respondents'. In that case the union brought an action under Section 301 of the Act for damages, enforcement of an arbitration award against the Company and a declaration of rights for breach of a contract prohibiting subcontracting of work to be performed on the construction site to a non-union contractor. The District Court dismissed on the grounds that the bringing of the lawsuit constituted coercion within the meaning of Section 8(b)(4). On appeal, the Fifth Circuit reversed. The Court noted that Congress had expressly preserved the validity of the contract clause involved and that it would be inconsistent to rule that judicial enforcement of it was barred since that would render the clause of "little or no value." 332 F. 2d at 686. However, the Court was careful to limit its ruling to judicial enforcement of the contract (332 F. 2d at 686):

We believe Congress used "coerce" in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike,

aff'd 342 U.S. 237; *N.L.R.B. v. Local 751, Carpenters*, 285 F. 2d 633, 639-640 (C.A. 9). Consequently Local 769 is jointly responsible for the unlawful coercion prohibited by the Act. Local 769's representatives sought IBEW's intervention and fully participated in all that followed. It is irrelevant that the common objective could not be achieved without IBEW's assistance.

picketing, or other economic retaliation or pressure in a background of a labor dispute.

Termination of Ets-Hokin's contracts would have been retaliatory self-help rather than judicial action. Accordingly, the threat to terminate, unlike a threat to bring suit, is coercive under the definition set forth in *Hardy*.¹⁰

Respondents further contended that the threat to terminate was no more than an announcement of their intention to invoke an alternate form of contract remedy—unilateral rescission for material breach. In evaluating this contention it should be borne in mind that respondents threatened to terminate *all* contracts with Ets-Hokin, not only the contract with Local 769's predecessor. Even if the remedy of unilateral rescission were fully applicable to labor contracts,¹¹ it would hardly be resorted to in support of a unilateral rescission of *all* contracts with Ets-Hokin. Most important, it is apparent that more is involved

¹⁰ Since respondents have the right to bring suit against Ets-Hokin, there is no substance to the contention urged before the Board that the subcontracting clause has little value if respondents cannot enforce it in the manner which they employed here. The courts may grant damages, specific performance, declaration of rights and other appropriate relief to insure that the clause retains the value which Congress meant to preserve for it.

¹¹ In other contexts, the Supreme Court has ruled that the traditional contract remedy of unilateral rescission must give way where it comes in conflict with national labor policy. Thus, the Court has ruled that a union's breach of a no-strike clause does not automatically entitle the employer to disregard his contractual obligation to arbitrate. *Local Union No. 721, United Packinghouse, Food & Allied Workers AFL-CIO v. Needham Packing Co.*, 376 U.S. 247.

than the law of private contracts. As developed more fully, *infra*, pp. 21-30, the enactment of the construction industry proviso to Section 8(e) was not intended to affect the application of Section 8(b)(4). It was Congress' intent that a contract saved from illegality by that proviso could not be enforced by means prohibited under Section 8(b)(4). Coercive measures undertaken by a union are not saved from illegality because that they are undertaken to enforce a contract clause lawful under the proviso. *Local 1976, Carpenters v. N.L.R.B. (Sand Door)*, 357 U.S. 93, 104-107; *N.L.R.B. v. Int'l Union of Operating Engineers*, 293 F. 2d 319, 323 (C.A. 9); *N.L.R.B. v. Int'l Bro. of Electrical Workers, Local 683*, 359 F. 2d 385, 386 (C.A. 6); *Local 5, United Ass'n etc. v. N.L.R.B.*, 321 F. 2d 366, 369-370 (C.A. D.C.), cert. denied, 375 U.S. 921; *Orange Belt District Council v. N.L.R.B.*, 328 F. 2d 534, 537 (C.A. D.C.), enforced subsequent to Board decision on remand, 365 F. 2d 540; *N.L.R.B. v. Local 217, United Ass'n etc.*, 361 F. 2d 160, 162 (C.A. 1).¹² Thus, irrespective of whether the construction industry proviso saves all or only a part of the subcontracting-termination clause from illegality under Section 8(e), respondents' threat, in the concrete situation, to invoke the severe economic sanction

¹² "We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit. We also realize the difficulty the building crafts have with the secondary boycott provision of the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute." *Local 5, supra*, 321 F. 2d at 370.

of termination unless Ets-Hokin ceased doing business with Rose-Phoenix violated Section 8(b)(4)(ii)(B). "The proviso does not legalize strikes or other coercive action to enforce such clauses." *N.L.R.B. v. Int'l Union of Operating Engineers*, 293 F. 2d 319, 323 (C.A. 9).

II. The Board properly found that respondents violated Section 8(e) of the Act by entering into a contract which provided for the termination of contractual relations by the contracting IBEW local and by all other IBEW locals in the event Ets-Hokin subcontracted to a non-IBEW contractor

A. Introduction: The general proscription of Section 8(e) and its legislative history

The declared purpose of the secondary boycott provisions of the 1947 Taft-Hartley Act was to limit the area of industrial dispute, in order to confine its effects to the parties immediately concerned, and to prevent its extension to employers and employees not directly involved.¹³ As the Supreme Court pointed out, these provisions were aimed at "shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692. However, in the interval between the passage of the Taft-Hartley Act and the 1959 amendments, labor organizations resorted to tactics to circumvent the secondary boycott proscriptions by successfully exacting from employers so-called "hot cargo" agree-

¹³ S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 22, 54; 1 Leg. Hist. of Labor-Management Relations Act, 1947 (G.P.O., 1948), pp. 414, 428, 460 (hereafter referred to as "Leg. Hist. '47"); 2 Leg. Hist. '47, 1106.

ments under which the employers relinquished their freedom to handle or provide goods and services for or to employers which the contracting union considered "unfair."¹⁴ The Supreme Court in *Local 1976, United Brotherhood of Carpenters v. N.L.R.B. (Sand Door)*, 357 U.S. 93, held that such agreements were not illegal, pointing out that under the then-existing secondary boycott provisions contained in Section 8(b)(4), the legal prohibition was directed not at any contractual *agreement* entered into on the part of the employer, but only at union *inducement* of employees to refuse to handle goods.¹⁵

Cognizant of this "major weakness in the law against secondary boycotts" (II Leg. Hist. 1708), Congress in the 1959 amendments undertook to close the "loopholes" which permitted labor organizations to circumvent these boycott provisions. Thus, Section 8(e), added by the Landrum-Griffin Act, made unlawful "any contract or agreement, express or implied" whereby an employer agrees not to handle products of another employer or agrees to cease doing business

¹⁴ See, e.g., the analysis of the secondary boycott and "hot cargo" provisions in the 1959 amendments by Senator Kennedy and Congressman Thompson, II Leg. Hist. 1707-1709.

¹⁵ Although the Supreme Court held that the execution of hot cargo agreements and voluntary compliance therewith by the employer were lawful, it also held that the inducement of employees to strike or refuse to handle "hot goods" with the object of forcing employers to abide by the hot cargo agreements, was unlawful. Such hot cargo agreements, the Court held, did not constitute a defense to the secondary boycott provisions. *Local 1976, supra*.

with any other person.¹⁶ In addition, Congress amended Section 8(b)(4) to make coercion to achieve such an agreement an unfair labor practice.

The legislative history of the 1959 amendments demonstrates that Congress, in acting to eliminate conduct it regarded as offensive, adopted a broad and comprehensive ban against "hot cargo" agreements.¹⁷ Throughout the course of Congressional deliberations,

¹⁶ The statutory language is:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided, further, That for the purposes of this subsection (e) and Section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce" and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided, further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

¹⁷ Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118 (1960): "The new law expresses the decision of Congress that 'hot cargo' agreements are basically wrong and should be forbidden entirely."

a myriad of concrete examples were presented in both Houses of Congress illustrating the concern over the ineffectiveness of then-existing law to deal with hot cargo clauses and other circumventions of the secondary boycott provisions of the Act.¹⁸ The bill passed by the Senate outlawed hot cargo commitments only in the trucking industry, where they had been most prevalent and most effective (S. 1555, 86th Cong., 1st Sess. Sec. 707(a)). The House bill, however, expanded the prohibition to include all hot cargo commitments in all industries (H.R. 8400, 86th Cong., 1st Sess., Sec. 705(b)). The provision which emerged from the joint conference adopted the language of the House bill, but the conferees were persuaded to grant exemptions for the construction and apparel industries (I Leg. Hist. 943).

Section 8(e)'s origin makes it plain that Congress intended the established law of secondary boycotts to serve as a guide in the application of this new provision. Indeed, many legislators referred to the Section 8(e) agreement as a "form of secondary boycott," or a "contract to enter into a secondary boycott," or a "loophole in Section 8(b)(4)," ¹⁹ Consistent with this legislative intention, the Board and the courts have uniformly found Section 8(e) violations wherever contractual devices have been used

¹⁸ See, e.g., II Leg. Hist. 1193-1194, 1196-1197, 1754, 1518-1519, 1568, 1580-1581, 1589, 1616, 1618.

¹⁹ See S. Rep. No. 187 on S. 1555, I Leg. Hist. 474, 475; H. Rep. No. 741 on H.R. 8342, I Leg. Hist. 778, 779; II Leg. Hist. 1007(3); *Ibid.*, at 1194(3), 1197(2); 1326(1), 1437(3), 1441(2), 1499(2), 1535(3), 1555(2), 1568(2),(3), 1575(3), 1616(2), 1708(1), 1750(1), 1829(2).

to achieve a *secondary* object, that is, where an employer and a union agree to boycott another employer in order to pressure that *other* employer into granting union demands.²⁰

Respondents do not—indeed cannot—contest the Board's finding that the contract clause in question, prohibiting subcontracting to a "non-IBEW" contractor and providing for termination of this and all other IBEW contracts in the event the subcontracting restriction is breached, has such a secondary object. The entire clause falls within the general proscription of Section 8(e) and is illegal unless exempted from that general proscription by the construction industry proviso.²¹ We turn next to a consideration of the application of the proviso to the contract clause in question.

²⁰ *N.L.R.B. v. Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9); *N.L.R.B. v. Milk Wagon Drivers' Union Local 753*, 335 F. 2d 326, 328-29 (C.A. 7); *Truck Drivers Local 413 v. N.L.R.B.*, 334 F. 2d 539, 547 (C.A. D.C.), cert. denied 379 U.S. 916; *Bakery Wagon Drivers & Salesmen, Local 484 v. N.L.R.B.*, 321 F. 2d 353, 358 (C.A. D.C.); *Los Angeles Mailers Union No. 9 v. N.L.R.B.*, 311 F. 2d 121 (C.A. D.C.); *Employing Lithographers of Greater Miami v. N.L.R.B.*, 301 F. 2d 20, 30 (C.A. 5).

²¹ The Board's finding that respondents violated Section 8(b) (4)(A) also turns on the application of the proviso. That section prohibits coercing an employer with an object of forcing him "to enter into any agreement which is prohibited by section 8(e)." Accordingly, respondent's attempt to force Ets-Hokin to reaffirm the termination clause violates Section 8(b) (4)(A) unless that clause is saved by the proviso. See *Construction, Production & Maintenance Laborers Union, Local 383, etc. v. N.L.R.B.*, 323 F. 2d 422 (C.A. 9); *Centlivre Village Apts.*, 148 NLRB 854, 855, 856, enforcement denied on other grounds, 352 F. 2d 696 (C.A.D.C.).

B. The construction industry proviso to Section 8(e) does not privilege the termination clauses

Section 8(e), as we have shown, constitutes a broad and comprehensive ban against "hot cargo" agreements. Congress, however, added a special proviso for the construction industry intended to permit unions in that industry to enter into hot cargo clauses which contemplate enforcement through the judicial process.²² Accordingly, the Board held in the case at bar that the restriction on subcontracting to non-IBEW contractors was, in itself, within the proviso. However, a clause which sanctions coercive self-help in the event of an employer breach flouts the carefully balanced Congressional scheme. As the Court of Appeals for the District of Columbia Circuit has stated, "* * * such secondary clauses may be enforced only through lawsuits and not through economic action." *Orange Belt*, *supra*, 328 F. 2d at 537. See also, *N.L.R.B. v. Int'l Brd. of Electrical Workers, Local 683*, 359 F. 2d 385, 386 (C.A. 6); *Local 5, United Ass'n etc. v. N.L.R.B.*, 321 F. 2d 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921. For this reason, as we shall now show, the termination clause involved herein lies outside the protection of the construction industry proviso.

The starting place for analysis is the language of the Act itself. As the text of Section 8(e) shows

²² The full text of the proviso is as follows:

"*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *."

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(*supra*, p. 18, n. 16), Congress fashioned the two industry provisos in terms which differ markedly. Most notably, the garment industry proviso contains an exemption from the terms of Section 8(b)(4) as well as Section 8(e); the construction industry proviso, however, does not refer to Section 8(b)(4). As a result, (1) economic action to secure *and* to enforce a hot cargo clause is permissible in the garment industry; (2) picketing to secure such an agreement in the construction industry is permitted but—under Section 8(b)(4)(B)—economic action to enforce it is prohibited; and (3) in all other industries picketing either to secure or to enforce a hot cargo clause is proscribed. *Construction, Production & Maintenance Laborers Union, Local 383, etc. v. N.L.R.B.*, 323 F. 2d 422, 425 (C.A. 9); *Orange Belt, supra*, 328 F. 2d at 53.

The omission of a reference to Section 8(b)(4) in the construction industry proviso was deliberate, reflecting a considered legislative judgment to ban secondary economic pressure in this industry, even though the proviso's enactment would privilege some secondary *agreements* to cease doing business. As Senator Kennedy explained during the debates on the bill:

This proviso affects only Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and *Moore Drydock* (92 NLRB 547) cases would remain in force.

* * * Since the proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will con-

tinue to be illegal under Section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. II Leg. Hist. 1433.²³

The conferees agreed:

The proviso applies only to Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Dry Dock* cases would remain in full force and effect. The proviso is not intended to limit, change or modify the present state of the law with respect to picketing at the site of a construction project * * *. It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract. (H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., pp. 39-40; I Leg Hist. 943-944).

In sum, prior to the enactment of Section 8(e), it was not unlawful for a general contractor in the construction industry to agree with a labor organization to engage only union subcontractors on the job. If

²³ *Denver Building* held that a union is not entitled to picket a construction industry employer merely because he is in the relationship of contractor-subcontractor with the primary employer. In *Moore Drydock*, the Board listed certain objective criteria to aid in determining whether picketing at a common jobsite is aimed at the primary employer or at a neutral. *Sand Door*, as explained at p. 17, n. 15 above, held that a hot cargo clause is not a defense under Section 8(b)(4) when a union strikes for a secondary object.

the general contractor broke the agreement and engaged a nonunion subcontractor, the union could seek enforcement of the contract in the courts. However, it could not attempt to enforce the agreement by inducing the employees of the general contractor or of the union subcontractors to go out on strike; for then, its conduct would run afoul of Section 8(b)(4)(A) (now 8(b)(4)(i)(B)), which made it an unfair labor practice to induce employees to strike for a secondary object. See *Local 1976, United Brotherhood of Carpenters (Sand Door)*, 357 U.S. 93; *N.L.R.B. v. Denver Building Trades Council*, 341 U.S. 675.

At the same time that Congress made it clear that the proviso was not meant to modify the law developed under Section 8(b)(4), Congress also moved to close what it considered to be a significant "loophole" in Section 8(b)(4). Although Section 8(b)(4)(A) of the Taft-Hartley Act prohibited a union or its agents from inducing employees to strike for a secondary object, direct coercion by the union of the neutral employer—i.e., threatening him with a strike or other economic sanctions unless he ceased doing business with the primary employer—was not prohibited. The new Section 8(b)(4)(ii)(B) prohibited such conduct. See *N.L.R.B. v. Servette*, 377 U.S. 46, 53–54, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv L. Rev. 1086, 1113 (1960); II Leg Hist 993–994, 1014, 1079, 1197, 1454.²⁴

²⁴ Other "loopholes" in Taft-Hartley Section 8(b)(4)(A) were also closed by Congress. Since that section prohibited the inducement of "concerted" refusals to work, a union could, without violating the law, induce a single employee to stop

One of the most important reasons for closing this "loophole" was felt to be the need to prevent unions from enforcing "hot cargo" clauses by direct coercion of the employer. Senator Goldwater explained the necessity for amending Section 8(b)(4) as follows (II Leg Hist 1079):

The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or cease doing business with, another person. If this objective is contrary to public policy, which it is, it is no less contrary to public policy to achieve it through one means rather than another.

Threats of a strike or picketing made directly to an employer can be as effective as the strike or picketing itself. In this way an employer may be coerced into . . . living up to hot cargo agreements. . . . Under the law a union may not enforce such an agreement by inducing the employees to refuse to perform services. The agreement can be just as effectively enforced, however, by coercion of the employer, which is permitted under the present law.

working. Also a union could induce anyone who did not come within the Act's definition of "employee" or who worked for an organization excluded from the definition of "employer". See *Servette, supra*, 377 U.S. at 51-53; *Aaron, supra*, at 1113-4 and the legislative history cited in the text. Senator Curtis expressed the sentiment which ultimately prevailed in Congress (II Leg. Hist. 989):

"* * * loopholes which permit unions to instigate effective secondary boycotts should be closed, and the effect of this bill will be to close them."

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In specifying that the construction industry proviso to Section 8(c), unlike the garment industry proviso thereto, would not limit the application of Section 8(b)(4), Congress clearly intended that the objective of preventing direct coercion of employers, proscribed by subpart (ii) of Section 8(b)(4), would have full play in the construction industry even though proviso-saved "hot cargo" agreements were to be permitted. Thus, although "hot cargo" agreements are lawful in the construction industry, the evil referred to by Senator Goldwater—i.e., enforcement of such agreements by direct coercion of the employer—is still illegal. The proviso "does not legalize an agreement which purports to authorize conduct in violation of Section 8(b)(4)(B)." *N.L.R.B. v. Local 217, United Ass'n of Journeymen & App. (The Carvel Co.)* 361 F. 2d 160, 162 (C.A. 1).²⁵

Carvel, supra, involved a construction industry contract which provided that no employee would be required to work on any job or project on which someone was performing at non-union standards, any work

²⁵ In addition to the evidence of Congressional intent shown by the legislative history cited above, Senator Goldwater, in a memorandum submitted to the Senate on the day the Landrum-Griffin Act was signed into law, stated:

"Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it" (II Leg. Hist. 1858).

within the jurisdiction of the contracting union. The Court agreed with the Board that the union's strike to enforce this contract when the employer breached it violated Section 8(b)(4)(B). *Id.*, at 162. Turning to the Board's finding that the clause itself violated Section 8(e), the Court accepted the principle urged here, that the proviso did not legalize a clause which sanctions Section 8(b)(4)(B) conduct. The Court, however, ruled that this legal principle was inapposite to the clause before it. Since the clause could be applicable to voluntary employee work stoppages independent of union inducement, the Court reasoned, the contract did not on its face seek to protect conduct proscribed by Section 8(b)(4)(B). *Id.* at 162-164. Only a union-induced work stoppage is within Section 8(b)(4). Accordingly, the Court held that the contract clause before it did not violate Section 8(e).

The termination clause in the case at bar, however, clearly contemplates union action. Employees cannot independently terminate a collective bargaining agreement—union action is necessarily called for. Even under the First Circuit's construction of Section 8(e), therefore, the contract clause involved here is not within the proviso because it does purport to sanction conduct prohibited by Section 8(b)(4)(B). “[T]he proviso was intended to dovetail with Section 8(b)(4), and neither to limit nor extend it” (361 F. 2d at 163). See also, *Sheet Metal Workers v. Hardy Corp.*, 332 F. 2d 682 (C.A. 5); *Orange Belt District Council v. N.L.R.B.*, 328 F. 2d 534, 537 (C.A.D.C.); *N.L.R.B.*

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v. *Int'l Bro. of Electrical Workers, Local 683*, 359 F.2d 385, 386 (C.A. 6).²⁶

In sum, Congress, in enacting a limited exemption from the ban of Section 8(e) for the construction industry, intended to sanction the kind of hot cargo agreement where an employer simply agrees not to do business with a non-union employer. We submit that Congress did not intend to sanction a contract which permits economic action by the union to enforce the agreement. As shown, Congress' dominant objective in enacting the construction industry proviso was to permit contractors and unions to enter into agreement to make the job "all union", but at the same time, to free the contractors of direct economic pressure—or the threat thereof—to enforce such agreements. An agreement whereby the contractor simply

²⁶ In *Carvel*, 152 NLRB 1672, 1677, the Board cited its prior ruling in *Muskegon Bricklayers Union No. 5*, 152 NLRB 360, 365-366:

"We can see no difference in practical effect . . . between a situation where a union induces employees to strike after an employer [breaches an exempted hot cargo clause] . . . and a situation where, in order to prevent such a breach, the union tells the employees that if the employer should violate the 'hot cargo' clause in the future, the employees may cease work with impunity."

Thus, the Board's position in *Carvel* was that clauses sanctioning self-help enforcement measures were not legalized by the proviso, where the effect of such measures would be *substantially similar* to the effect achieved by Section 8(b)(4)(B) conduct. The Board respectfully adheres to that position despite the First Circuit's rejection of it. However, since the enforcement measure which the instant contract purports to sanction is clearly violative of Section 8(b)(4)(B), this Court need not reach the broader position taken by the Board in *Carvel*. The *Muskegon* case itself is currently pending on petition for enforcement in the Sixth Circuit.

undertakes not to do business with a non-union employer subjects the contractor to nothing more than a lawsuit or an arbitration proceeding should he allegedly breach the agreement. On the other hand, where, as here, the contractor agrees that the union may terminate this and all other agreements it has with him, the contractor is subject to economic pressure proscribed by Section 8(b)(4), as well as a lawsuit, in the event of an alleged breach. As discussed *supra*, pp. 10-11, he is faced with a choice between ceasing to do business with the subcontractor or being "practically forced out of business" (Board Decision, R. 120). The termination provision here, in effect, acts as an enforcing mechanism, coercing the contractor to abide by his agreement not to deal with non-union subcontractors. In short, this kind of agreement creates a situation where the employer is subjected to pressure which is the type of secondary pressure which Congress sought to interdict in Section 8(b)(4).²⁷

Here, as in *Sand Door* itself, the Board has rejected union tactics "not comporting with the legislative purpose to be drawn from the statute, projected into

²⁷ Compare *Sand Door* itself, where the Court distinguished between the employer's choice whether to refuse to deal with another which arises in a concrete situation—which choice the Court held should be uncoerced—and such a choice arising more or less in the abstract when the collective bargaining agreement is drawn up. See 357 U.S. at 105-106; see also, *Construction, Production & Maintenance Laborers Union, Local 383 etc. v. N.L.R.B.*, 323 F. 2d 422, 426, n. 2 (C.A. 9). In the instant case, the termination provisions act as a coercing mechanism at the time the choice in the concrete situation must be made.

the practical realities of labor relations" (357 U.S. at 105); on "such a matter the judgment of the Board must be given great weight, and we ought not to set against it our estimate of the relevant factors" (*id.*, at 107.)

The termination clause is clearly barred by Section 8(e) insofar as other industries are concerned. *N.L.R.B. v. Amalgamated Lithographers of America*, (*Ind.*), 309 F. 2d 31, 39-42 (C.A. 9), cert. denied, 372 U.S. 943, See Lesnick, *Job Security and Secondary Boycotts*, 113 U. Pa L. Rev. 1000, 1013, n. 55 (1965). And the Board reasonably concluded that such a clause is not removed from the ban of that section by the limited construction industry proviso, since it is a means of secondary pressure which Section 8(b)(4) precludes respondents from exerting when a concrete situation arises.²⁸

²⁸ Respondents erroneously contended before the Board that the instant case is inconsistent with the Board's decision in *Amalgamated Lithographers of America* (*Miami Post*), 130 NLRB 968, enforced as modified 301 F. 2d 20 (C.A. 5). That case involved a primary "struck work" clause together with an enforcing termination clause, whereas the instant case involves a secondary restrictive subcontracting clause with a termination clause. As the Board pointed out, "[t]here is no legislative history which shows a congressional intent to limit to lawsuits the enforcement of a clause outside the reach of Section 8(e) without reference to its proviso, as in the *Amalgamated Lithographers* case. But there is such an intention manifested as to contracts which would be unlawful under Section 8(e) but for the construction industry proviso" (R. 121). In short, *Lithographers* held no more than that self-help economic measures in support of a primary objective were not unlawful—a proposition not involved here.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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MARCH 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

References to exhibits pursuant to Court Rule 18(2)(f)
(pages refer to the stenographic transcript).

No.	Identified	Received	Rejected
GENERAL COUNSEL'S EXHIBITS			
1(a) through 1(dd) -----	5	5	-----
2.-----	30	31	-----
3.-----	54	55	-----
4.-----	55	55	-----
5.-----	56	56	-----
6.-----	59	60	-----
7.-----	60	60	-----
8.-----	84	101	-----
9.-----	84	101	-----
10.-----	84	101	-----
11.-----	85	101	-----
12.-----	85	101	-----
13.-----	85	101	-----
14.-----	85	101	-----
15.-----	85	101	-----
16.-----	86	101	-----
17.-----	86	101	-----
18.-----	90	-----	-----
ETS-HOKIN'S EXHIBITS			
1.-----	57	57	-----
2.-----	114	115	-----
3.-----	133	136	-----
4.-----	331	332	-----
5.-----	333	333	-----

No.	Identified	Received	Rejected
IBEW'S EXHIBITS			
1-----	280	281	-----
2-----	295	296	-----
3-----	297	298	-----
4-----	298	301	-----
5-----	303	303	-----
6-----	320	321	-----
7-----	350	351	-----



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21407

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, AND
ITS LOCAL UNION NO. 769,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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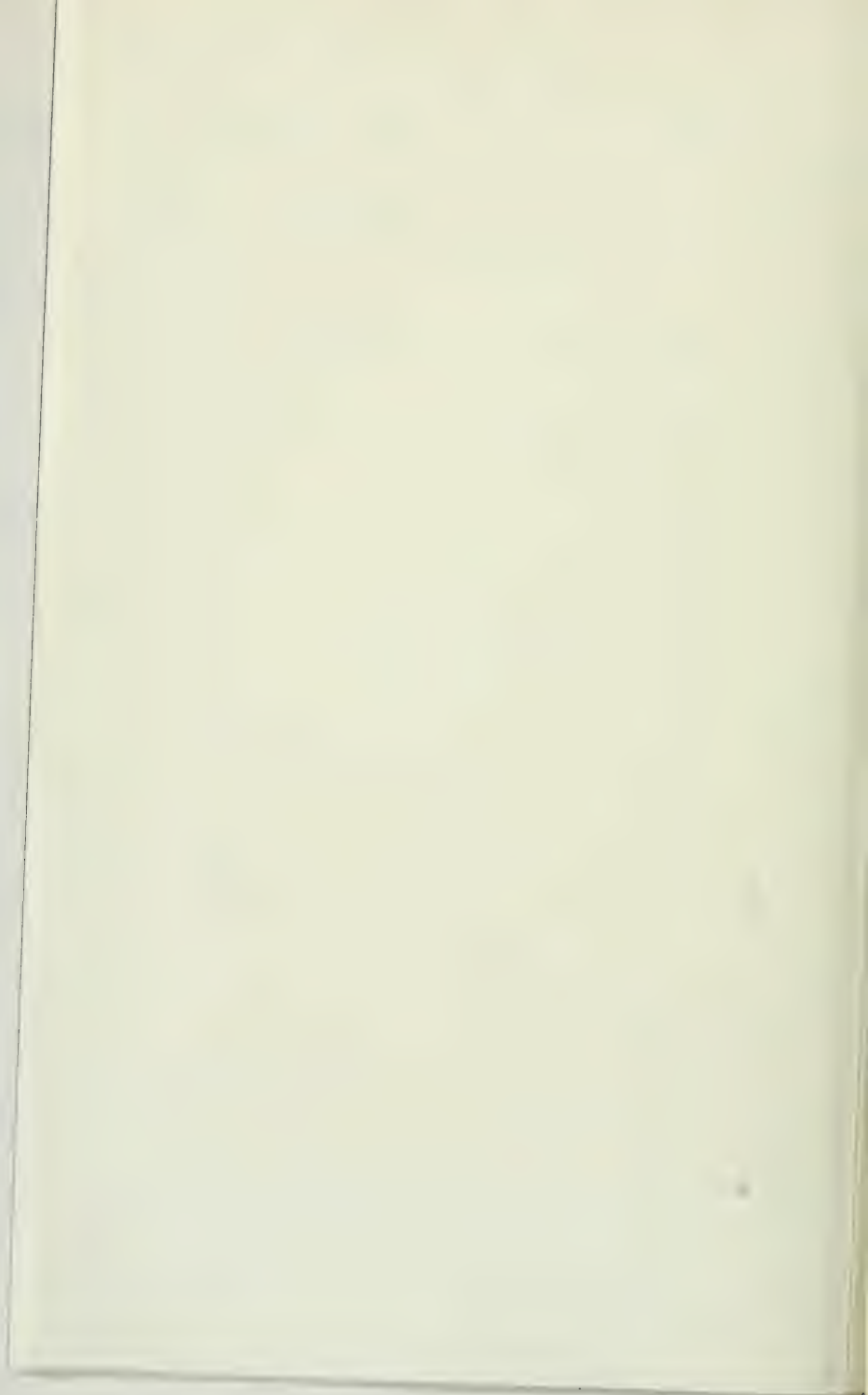
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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, AND
ITS LOCAL UNION NO. 769,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce its order (R. 125-126)¹ issued on August 31, 1965 against the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") and its affiliated Local Union No. 769 ("Local 769"). 154 NLRB 839. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.* The alleged unfair labor practices occurred at the Glen Canyon Dam Construction site in northern Arizona, within this judicial circuit.

¹ References to the pleadings reproduced as "Volume I, Pleadings" are designated "R". References to the stenographic transcript of the hearing filed with the Court are designated "Tr".

COUNTER-STATEMENT OF THE CASE

Ets-Hokin & Galvan, Inc. ("Ets-Hokin"), an electrical and general contractor, is incorporated in California and does business in various States (R. 46; Tr. 31). The U. S. Bureau of Reclamation awarded to Ets-Hokin prime contracts totaling \$20,691,271 for an electrical powerhouse and transmission lines in Glen Canyon, Arizona (G.C. Exh. 2). In October 1962, Ets-Hokin entered into a subcontract with Rose Construction Company, Phoenix Division ("Rose-Phoenix") to construct certain steel towers and other structures at the Glen Canyon site (R. 47: Tr. 87).

Ets-Hokin has maintained collective bargaining contract relationships with Respondent IBEW and its locals since 1920 (Tr. 63). In 1962 and at all subsequent times here involved, Ets-Hokin was subject to agreements with IBEW Locals covering work at the sites of its various construction jobs, including the Glen Canyon site, which provided in part as follows:

"The Local Unions are a part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative of this or any other such Local Union by the Employer, will be sufficient cause for cancellation of this agreement, after the facts have been determined by the International Office of the Union."

In January 1963, contrary to Ets-Hokin's agreement, Rose-Phoenix invited Local 428 of the Union of Operating Engineers to organize its employees at Glen Canyon (Tr. 330). Shortly thereafter, Rose-Phoenix executed an agreement recognizing Local 428 as the exclusive bargaining agent and sole source of personnel on the project (R. 47; Tr. 282; Resp. Exh. 5). The agreement provided for wage scales below the rates paid to journeymen linemen under the Local 769 contract and required to be paid pursuant to

the Davis-Bacon Act as amended (40 U.S.C. 276a). These lower rates motivated Rose-Phoenix in contracting with Local 428 (Tr. 322, 305, 312). On Rose-Phoenix insistence, the clause requiring compliance with the Davis-Bacon Act was stricken from the agreement with Ets-Hokin (Tr. 141, G.C. Exh. 17). The Bureau of Reclamation found that the job classifications and rates actually made effective by Rose-Phoenix violated the Davis-Bacon Act (Resp. IBEW Exh. 7), and directed changes which Rose-Phoenix persisted in violating (Tr. 325-326).

During the period January-March 1963, Respondents repeatedly advised Ets-Hokin that it was violating the agreement,—by subcontracting to Rose-Phoenix which had no agreement with Respondents, and by paying wages below the prevailing scales and standards at the Glen Canyon site (Tr. 88-95, 101). The undisputed record shows that Rose-Phoenix had deceived Ets-Hokin by pretending that it had an agreement with Respondents (Tr. 51, 53, 79, 136, 249-250, 294). Otherwise Ets-Hokin would not have considered Rose-Phoenix for the Glen Canyon project (Tr. 36). By this deception, Rose-Phoenix had “made country boys” out of Ets-Hokin (Tr. 79). Upon ascertaining the facts, Ets-Hokin readily admitted it was in violation of its agreement with Respondents; and throughout this period it sought only a sufficient opportunity, which Respondents afforded, to correct the situation voluntarily and amicably (Tr. 70-71, 156-157, 254-255). Ets-Hokin testified that there were advantages to operating as a union contractor; that it was the policy of the Ets-Hokin company to deal with union subcontractors; and that it had always been a union contractor and it “proposes to stay that way for a number of reasons” (Tr. 78-79). In April 1963, Ets-Hokin terminated the subcontract to Rose-Phoenix under an agreed settlement to pay \$50,000 plus a generous allowance for equipment (R. 52; Tr. 273; Ets-Hokin Ex. 1-B). Ets-Hokin thereupon undertook the construction job directly, and performed the work in accordance with its agreement

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with Local 769, including the above quoted "annulment clause" and a non-discriminatory referral system (Tr. 59).

All the company witnesses having dealings with Respondents during this period testified without contradiction that no picketing or work stoppages occurred or were threatened at Glen Canyon or any other Ets-Hokin construction job, and that Respondents made no threat, suggestion or demand to withdraw workers or to refuse referral of workers to the Glen Canyon or other Ets-Hokin construction jobs (Tr. 78, 147, 177-178, 225). The Board made no finding to the contrary (R. 118-125). Moreover, only IBEW President Freeman was authorized by the union constitution to find the facts on the basis of which Local 769 might terminate the Ets-Hokin agreement, under the annulment clause or otherwise (Tr. 89, 95). Freeman's correspondence with Ets-Hokin made no threat of any kind (G.C. Exh. 4).

The Trial Examiner found that Respondents violated Sections 8(b)(1)(A) and 8(b)(2) and Ets-Hokin violated Sections 8(a)(1) and 8(a)(3) by "causing" termination of Rose-Phoenix's employees. On these issues, the Board reversed the Examiner and dismissed the complaint. The Board found that the Respondents "had the right to insist, albeit not by proscribed means, that the employer subcontract work only to IBEW subcontractors" as required by the "subcontracting clause" (R. 125). The Board construed the subcontracting clause as applicable only to the construction site (R. 119-120), and upheld its validity under the following proviso to Section 8(e) :

"Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

There is no appeal before the Court on these issues.

The Trial Examiner and the Board also found, however, that the "termination clause" of the contract was not saved by the foregoing proviso, and violated Sections 8(e), 8(b)(4)(ii)(A), and 8(b)(4)(ii)(B) of the Act. The Board ordered Respondents to cease and desist from entering into, maintaining, or enforcing the termination clauses of the contract; and further ordered Respondents to cease and desist from threatening, coercing, or restraining Ets-Hokin or any other person to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any other person (R. 125-126). Board Member Fanning concurred in dismissing the complaint with respect to Sections 8(b)(1), 8(b)(2), 8(a)(1), and 8(a)(3) of the Act, and dissented from the conclusions and order concerning Sections 8(e) and 8(b)(4).

SPECIFICATIONS OF ERROR

Respondents specify that the Board erred—

1. In concluding that Respondents violated Section 8(e) of the Act.
2. In concluding that Respondents violated Section 8(b)(4)(ii)(A) of the Act.
3. In concluding that Respondents violated Section 8(b)(4)(ii)(B) of the Act.
4. In refusing to find that Respondents were entitled to terminate the agreement because the Davis-Bacon Act was violated on the Glen Canyon site.

ARGUMENT

I. The Board Erred in Concluding that Respondents Violated Section 8(e) of the Act

Ets-Hokin, the prime contractor here involved, has maintained contract relationships with IBEW locals since 1920; and the particular clauses here involved predate the enact-

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ment of the 1959 amendments to Section 8 relied upon by the Respondents and the Board respectively. The Board did not find, and could not find on this record, that Respondents caused a strike, picketing, or handbilling against any employer or other person, or threatened any such action against anyone (Tr. 77-78). The Board did not find, and could not find on this record, that any employee left work, or that any applicant was refused referral for work, at any time, or that Respondents threatened any such action at any time (Tr. 147). There is no finding that the Respondents in any way threatened "no contract no work". See dissent by Board Member Fanning (R. 131).

On these facts, the Board erred in finding that Respondents violated Section 8(e) of the Act.

A. THE AGREEMENT WITH LOCAL 769 RELATED "TO THE CONTRACTING OR SUBCONTRACTING OF WORK TO BE DONE" AT THE CONSTRUCTION SITE

The Board expressly found (R. 119-120):

"At all times material to this case, Ets-Hokin had been engaged in electrical contracting in the building and construction industry. The contract itself is one which was entered into between the IBEW and the National Electrical Contractors of America. The scope of the agreement covers work normally done at the construction site, such as pole line construction, steel and metal construction, highway lighting systems, and electrical underground construction. Throughout the agreement the term 'construction' appears frequently. It is clear that the contract provisions refer to construction work. It was also stipulated at the hearing that the contracting clauses are found only in contracts with the IBEW applicable to the construction industry and that Ets-Hokin was performing the type of work found in the contract. Upon the basis of the foregoing, we find that the subcontracting clause applies, and was intended to apply, only to on-site construction work".

The Board's brief in this Court (p. 2) states that the unfair labor practices before this Court in this proceeding "occurred at the Glen Canyon Dam construction site in northern Arizona, within this judicial circuit".

B. THE AGREEMENT WITH LOCAL 769 WAS WITHIN THE SCOPE OF THE EXEMPTION OF THE CONSTRUCTION INDUSTRY, UNDER THE PROVISIO TO SECTION 8(e)

1. *The statutory language of the construction industry exemption in Section 8(e) reads:*

"Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

This language is unqualified and all-embracing. It covers agreements relating to the contracting of work, as well as the subcontracting of work, at the construction site. It clearly embraces and validates every clause in the agreement between Local 769 and Ets-Hokin, discussed above.

The Board erred by giving a literal construction to Section 8(b)(4) instead of interpreting and applying that provision together with Section 8(e), in the true statutory context as intended by Congress.

2. *Legislative history* "may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question". *NLRB v. Allis Chalmers Mfg. Co.*, U.S. Sup. Ct., 35 L.W. 4623, 4624 (decided 6/12/67). "That principle has particular application in the construction of labor legislation, which is 'to a marked degree, the result of conflict and compromise between conflicting forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their

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respective interests'". *Carpenters Local 1976 v. NLRB (Sand Door Co.)*, 357 U.S. 93, 99-100 (1958); *Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619 (1967).

The legislative history of the construction industry exemption fully sustains Respondents' interpretation. Section 8(e) and the construction industry proviso were inserted at the same time in 1959 by the Conference Committee considering bills which eventuated in the Labor-Management Reporting and Disclosure Act of 1959. In the same legislation, Congress enacted the amendments to Section 8(b)(4)(A) and (B), upon which the Board relies. The legislative history was traced by this Court in *Laborers Local 383 v. NLRB (Colson & Stevens Co.)*, 323 F. 2d 422 (1963). More recently the Supreme Court said in the *Woodwork* case, *supra*, 386 U.S. at 634-635:

"Section 8(e) simply closed still another loophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door)*, 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a 'hot cargo' clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses, but also to create a situation in which such clauses might be employed to exert subtle pressure upon employers to engage in 'voluntary' boycotts. . . . This loophole closing measure likewise did not expand the type of conduct which §8(b)(4)(A) condemned".

The Supreme Court added (386 U. S. at 637-638):

"However, provisos were added to § 8(e) to preserve the status quo in the construction industry . . . [The] construction proviso [is] a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there. . . ."

Senator Curtis, a co-sponsor of the bill submitted by Senator Goldwater, referred to the so-called "secondary boycott provisions" of the Act (Section 8(b)(4)(A) and (B)) as follows:

"The secondary boycott provisions of the Act rest upon a combination of two factors: First, an objective of the union must be to compel one person to cease doing business with another; second, the means employed to achieve this objective must be through a strike or inducement of employees to strike" (II *Leg. Hist.* 989).

Senator John F. Kennedy explained the import of the construction exemption in the legislative debate:

"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under Section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." [II *Legislative History of Labor-Management Reporting and Disclosure Act of 1959* "(Leg. Hist.)" p. 1433].

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Senator Goldwater had printed in the Congressional Record an analysis by Michael Bernstein, Minority Counsel for the Senate Labor Committee, stating in part:

“But a building-trades union may enter into a contract with a contractor—building contractor—whereby he agrees that he will not let work to any subcontractor who is not union. This is not illegal. Now here is what it may do: The union may go into court and sue him if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it, which is the law now” (II *Leg. Hist.* 1829-1830).

In brief, reading together all the 1959 amendments discussed above, labor organizations in the construction industry remain free to make agreements relating to the contracting or subcontracting of work at the construction site, and to enforce these agreements by judicial action. What they cannot do is to achieve such enforcement by striking or picketing in violation of Section 8(b)(4)(ii)(B).

3. *Judicial interpretation of the construction industry exemption clearly upholds Respondents' contentions.*

In *Sheet Metal Workers Local 48 v. Hardy Corporation*, 332 F. 2d 682 (5th Cir. 1964), the plaintiff union sued under Section 301 of the Taft-Hartley Act for a declaratory judgment, damages for breach, and a mandatory injunction to compel arbitration of a contract clause providing that—

“No employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project” (p. 683).

The District Court held the clause valid under Section 8(e) and issued a declaratory judgment, but denied enforcement remedies, and also dismissed defendant's counterclaim for damages. 218 F. Supp. 556 (N.D. Ala. 1963). The Fifth Circuit reversed. After reviewing the statutory language and legislative history, substantially as outlined above, the Court said:

... It follows that the agreement here is exempted from the operation of § 8(e), and is thus valid and otherwise subsisting insofar as the Labor Act is concerned. It may not, however, be enforced by threats, coercion or restraint.

"The reasoning applied by the District Court in denying judicial enforcement of the agreement was that such a course of action would amount to coercion within the contemplation of § 8(b)(4)(ii)(B), albeit through court processes and not a form of economic pressure or self help. Thus is the question presented.

"While the authorities to sustain this or a contrary view are admittedly sparse, we are constrained to a view opposite that of the District Court. This will avoid the anomalous situation of an agreement, left valid under one section of the Act but unenforceable by threat, coercion or restraint under another section, being rendered of little or no value by an interpretation of coercion to embrace the use of the courts. These sections were enacted concurrently and we think clear language would be necessary to convey a congressional intent that a party to an otherwise valid labor agreement may not turn to the courts for relief upon its breach.

* * *

"The District Court took the dictionary definition as its meaning in the Act and determined that it embraced judicial action. *Barrows v. Jackson*, 1953, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 and *Shelley v. Kraemer*, 1948, 342 U.S. 1, 68 S. Ct. 836, 92 L. Ed.

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116, 3 A.L.R. 2d 441, were also cited to demonstrate that legal action or court action amounts to coercion; there state action. Of course, it cannot be successfully urged that a court order or decree is not coercive, or that the mere filing of a suit and its prosecution is not likewise coercive in nature, but such an expansive interpretation of the term proves too much.

"We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than non-judicial acts of a compelling or restraining nature, applied by way of *concerted self help* consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute" (pp. 684-685, 685-686).

* * *

"In sum, we cannot attribute such a random intention to the Congress as Hardy asserts. To do so would prevent the judicial enforcement of an agreement, the validity of which was expressly preserved by that body, when there is nothing in the language of the statute or in the legislative history to indicate that the doors of the courts should be closed under the circumstances. Such a result is not to be lightly inferred, and we hold that the prohibited coercion in § 8(b)(4)(ii)(B) does not preclude judicial enforcement of a hot cargo clause left valid and enforceable under § 8(e) of the Act, as amended.

"There was no error in dismissing the counterclaim which was based on the theory that attempted judicial enforcement amounted to coercion" (*Italics supplied*) (pp. 687-688).

See also *Plumbers Local 5 v. NLRB*, 321 F. 2d 366, 370 (D.C. Cir. 1963) cert. den. 375 U. S. 921 (1963); *Orange Belt Painters Council v. NLRB*, 328 F. 2d 534, 537 (D. C. Cir. 1964); Jones, *Specific Enforcement of Hot Cargo Provisions in Collective Bargaining Agreements*, 6 UCLA L. Rev. 85 (1959).

In *Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council, et al.*, 354 F. 2d 1 (7th Cir.

1965), the defendant Council entered into an agreement with the Rockford Building Contractors Association which precluded the signatory contractors from contracting for work to be done by anyone who did not have a collective agreement with the Council and affiliated unions having jurisdiction over the class of work involved. Plaintiff, a non-signatory, entered into an agreement with Suarez Brothers, a contractor signatory, to sell and install certain prefabricated tile in a construction project. Defendants sought and secured from a local court an injunction permanently restraining Suarez from violating the aforesaid agreement. Suarez thereupon directed plaintiff to cease work on the project. Plaintiff sued the Union Council in the U. S. District Court for an injunction and damages, alleging breach of the Taft-Hartley Act and the federal antitrust laws. The District Court dismissed the suit. The Seventh Circuit affirmed:

"Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes 'an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction . . .' It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.

"The National Labor Relations Board has approved agreements of this type even when not specifically limited to a particular construction site. Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co., et al.) (1965) 151 NLRB No. 83, 58 LRRM 1490.

"A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. Orange Belt District Council of Painters No. 48, AFL-CIO v. N. L. R. B., 1964, 117 U. S. App. D.C. 233, 328 F. 2d 534, 537; Building and Construction Trades Council of San Bernardino & Riverside Counties v.

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N. L. R. B., 1964, 117 U. S. App. D.C. 239, 328 F. 2d 540. *Economic action to secure such agreements has been allowed.* Essex County and Vicinity District Council of Carpenters, etc. v. N. L. R. B., 3 Cir., 1964, 332 F. 2nd 636, 641; Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO v. N. L. R. B., 9 Cir., 1963, 323 F. 2d 422, 425. In the face of these decisions, it would be unreasonable to hold that such an agreement constitutes a violation of the anti-trust laws" (*Italics supplied*) (p. 3).

The *Hardy* and *Suburban* decisions validate legal sanctions—damages, injunction, and specific preformance—of effectuate agreements under the construction industry proviso. The voluntary compliance² achieved by the Respondents herein is far milder than in those judicially-approved instances.

The Board's brief concedes (p. 14, n. 10) that "the courts may grant damages, specific performance, declaration of rights and other appropriate relief to insure that the [construction industry exemption] retains the value which Congress meant to preserve for it". The Board adduces no sound logical or legal basis for its conclusion that the Act somehow prohibits the Respondents from achieving voluntary compliance with an admittedly valid subcontracting clause, as in the instant case. The dissenting Board Member Fanning correctly concluded: "To label the right of termination a form of unlawful economic pressure is to beg the issue, rather than to answer it" (R. 130).

Manifestly, the "termination clause" supplements and supports the basic "subcontracting clause". As correctly interpreted by dissenting Board Member Fanning:

² See O. W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897): "The duty to keep a contract at common law means a predietion that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference" (p. 462).

"Were I to agree with the majority that the contractual right of termination constitutes 'economic pressure' and places the clause outside the protection of the proviso to 8(e), I would, perforce, find the entire clause invalid. The clause in issue operates as a restriction on the employer's right to subcontract solely by virtue of the fact that the IBEW has the right to cancel its entire agreement if the employer subcontracts work to subcontractors who do not have agreements with appropriate IBEW Locals. The entire clause constitutes an implied agreement not to subcontract to such subcontractors. The two parts of the clause are not severable. The majority is rewriting the parties' contract to the extent it finds that a restriction on subcontracting survives its striking down of the termination provision. Surely, if it is true as the majority states, and as I agree, that our function is not to administer the law of private contracts, it is all the more true that our function does not include rewriting contracts of the parties. *Employing Lithographers of Greater Miami Florida v. N.L.R.B.*, 301 F. 2d, 20, 28, enforcing 130 NLRB 968, as modified in pertinent part" (R. 128, n. 22).

The Board is empowered to effectuate but not to rewrite the agreement made by the parties. *NLRB v. C & C Plywood Corp.*, 385 U. S. 421, 427-428 (1967). The "termination clause" simply and plainly expresses the Respondents' right to rescind where, as here, the prime contractor committed a material breach by violating the "subcontracting clause". This follows a widely accepted principle of contract law. 17A C.J.S. *Contracts* Sec. 422(1), p. 521 (1963); Williston, *Contracts*, Sees. 683, 893A (3d ed.). The courts have applied this contract principle in appropriate cases in the context of the National Labor Relations Act. *E.g.*, *United Electrical Workers v. NLRB (Marathon Electric Co.)*, 223 F. 2d 338 (D.C. Cir. 1955), *cert. den.* 350 U. S. 981 (1956); *Boeing Airplane Co. v. NLRB*, 174 F. 2d 988 (D.C. Cir., 1949); *Boeing Airplane Co. v. Machinists Lodge 751*, 91 F. Supp. 596, 609, *aff'd.* 188 F. 2d 356 (9th Cir. 1951), *cert den.* 342

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U. S. 821 (1951); *Neuffer v. Bakery Union*, 307 F. 2d 671 (D.C. Cir. 1962) (forfeiture clause).³

Board Member Fanning correctly analyzed the statutory provisions in his dissenting opinion:

"Thus, the controlling distinction is that between economic action, such as strikes, picketing, and other related conduct, on the one hand, and resort to recognized legal or judicial remedies for breach of contract on the other. Clearly, the IBEW lawfully could have filed suit for damages or specific performance for the breach of its agreement and, if the latter were ordered, obtained precisely the same result as it did herein. But another, long-accepted, remedy is available to a party to a contract when the other party commits a material breach of that contract. That remedy is the right to rescind the contract. As stated in *Corpus Juris Secundum*, 'On a material breach of the contract the injured party may elect to rescind the contract or to stand on it.' Certainly the articulation within the contract of this lawful right of election of remedies should not have the anomalous effect of rendering unlawful the exercise of that right, particularly where there is not the slightest evidence that the Congress, having granted specific contractual rights to employers and unions in the construction industry, then intended to deprive the parties to such agreements of the well-established remedies for breach of those very rights. I would find that the election of this remedy, like that of seeking judicial enforcement, is a lawful form of action and not a prohibited act of coercion under Section 8(b)(4).

"Finally, the majority's conclusion cannot be supported on the theory that termination of the contract will be followed by a strike or picketing; a 'no contract-no work' theory. The record herein will not sustain a finding that the termination threat included a threat to withdraw men or to picket Ets-Hokin. Indeed, the Trial

³ The decision in *Packinhouse Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964), relied upon by the Board (Br. 14, n. 11), is obviously distinguishable on the facts and the arbitration clause there involved. 376 U.S. at 250-252. See *Boeing Co. v. UAW*, 370 F. 2d 969 (3d Cir. 1967).

Examiner was quite careful to refrain from making any such finding. And, while these events could occur or could be thought likely to occur, such supposition will not satisfy the General Counsel's burden of proving they did occur or were actually threatened." (R. 130-131)

This analysis is fully confirmed by recent Supreme Court decisions. In *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that a union's proposal to bar "subcontracting out" was a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act. Equally mandatory is the duty to bargain about clauses "relating to the contracting or subcontracting at the site," validated under the construction industry exemption. See *Suburban Tile Center v. Rockford Council*, 354 F. 2d at 3 (7th Cir. 1965), quoted *supra* pp. 13-14. In upholding "will not handle" clauses involved in the *Woodwork* case *supra*, the Supreme Court said (386 U.S. at 643):

"It would therefore be incongruous to interpret §8(e) to invalidate clauses over which the parties may be mandated to bargain and which have been successfully incorporated through collective bargaining in many of this Nation's major labor agreements".

This statement is equally applicable to the contract clauses in the instant case.

In *NLRB v. Operating Engineers Local 12* (Engineers, Ltd.) 323 F. 2d 545 (9th Cir. 1963), the employer had discharged an employee who had not been referred by the union hiring hall. The Board found the employer in violation of Section 8(a)(3) of the Act; and also found the Union in violation of Section 8(b)(1)(A) of the Act, making it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their organization rights under the Act. This Court reversed, holding that the discharge was privileged under the applicable contract, which provided for exclusive but nondiscriminatory hiring through the union hiring hall. This Court concluded that

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the Act does not preclude the Union from "persuading the employer to comply with a binding agreement"; and that "the Union was within its rights in demanding that the Employer obtain its workmen" through the hiring hall. It should be emphasized that such hiring hall clauses are mandatory subjects of collective bargaining. *NLRB v. Tom Joyce Floors Inc.*, 353 F. 2d 768 (9th Cir. 1965); *NLRB v. Houston Chapter AGC*, 349 F. 2d 449 (5th Cir. 1965).

It was unnecessary to file suit in this case because Ets-Hokin conceded that it was in violation of the "subcontracting clause". A suit for rescission would simply have resulted in the declaration of the elementary principle of contract law that an admitted material breach of an agreement by a party to a contract empowers the other party to elect to rescind. Had such a suit been filed (or threatened), and had it been settled by compliance before judgment, such action would have been clearly lawful even under the Board's theory of the law. The instant case is not different in any material respect from the stated illustration.

II. The Board Erred in Concluding that Respondents Violated Section 8(b) (4) (ii) (A) of the Act

The foregoing discussion of the construction industry exemption to Section 8(e) likewise establishes that the Board erred in finding that Respondents used prohibited means for an object of "foreing or requiring any employer . . . to enter into any agreement" prohibited by Section 8(e). This Court's decision and reasoning in *Laborers Local 383 v. NLRB (Colson & Stevens Construction Co.)*, *supra*, are clearly decisive. The Unions there involved caused picketing of construction sites in Phoenix, Arizona at which the Colson & Stevens firm was engaged as general contractor, in order to obtain an agreement that any subcontractors on job sites would be bound by the terms of the agreement. During the picketing, and for some months previously, Colson & Stevens had outstanding subcontracts with nonunion

subcontractors for construction work which was subject to the basic agreement. There, as here, the Board analyzed the literal language and legislative history of Section 8(b)(4), and concluded that the unions had violated Subdivisions (A) and (B) thereof, notwithstanding the construction industry exemption in Section 8(e). This Court reversed:

“As to §8(b)(4)(A), the Board’s position is that the §8(e) proviso must be construed as applying only to agreements voluntarily entered into; that while such an agreement is not unlawful under §8(e) when voluntarily reached, picketing to secure it is unlawful under §8(b)(4)(A).

“It may well be that §8(e) itself is addressed only to voluntary agreements; *it is not §8(e) but §8(b)(4)(A) which prohibits coercion*. However, (A) prohibits it only where the object of the coercion is an agreement which is ‘prohibited’ by §8(e) from voluntarily being reached. The effect of the proviso is to exclude from that prohibition the subcontracting clause here at issue, and the two sections read together, as they are intended to be read, say most clearly that if such an agreement may voluntarily be reached, picketing to secure it is not made unlawful.

“The Board protests that the legislative history supports their construction. We cannot agree” (Italics supplied).

The NLRB subsequently accepted the interpretation of this Court on the facts of *Colson & Stevens*. See *North-eastern Indiana Building & Construction Council (Centlivre Village Apartments Inc)*, 148 NLRB 854, 57 LRRM 1081 (1964), reversed on other grounds 352 F.2d 696 (D.C.Cir. 1965).

The Board’s fundamental error in *Colson & Stevens*, *supra*, as in the instant case, lies in the attempt to read together, and apply to the construction industry, language inserted by the 1959 Act in Section 8(b)(4)(ii)(A) and

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Section 8(e), while ignoring the construction site exemption which was inserted at the same time in 1959. Respondents' actions in the instant case, involving no strike, picketing or threats thereof, fall outside the scope of Section 8(b)(4)(ii)(A), even more clearly than in *Colson & Stevens*, where the unions admittedly picketed the construction site.

III. The Board Erred in Concluding that Respondents Violated Section 8(b)(4)(ii)(B) of the Act

The argument and precedents discussed above already dispose of the Board's conclusion that the Respondents also violated Section 8(b)(4)(ii)(B) by entering into and obtaining voluntary compliance with the agreement here involved. Briefly:

A. RESPONDENT'S AGREEMENT AND ACTION RELATING TO WORK AT THE GLEN CANYON CONSTRUCTION SITE DID NOT VIOLATE SECTION 8(b)(4)(ii)(B)

In *Sheet Metal Local 48 v. Hardy Corporation*, quoted *supra*, the Court specifically held that § 8(b)(4)(ii)(B) does not preclude judicial enforcement of a contract validated under the construction industry exemption. In this context, the Court concluded that the "coercion" prohibited by Subd. (B) means "concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute" (322 F.2d at 686).

Respondents in the instant case engaged in no strike, picketing, handbilling, or non-referral, nor did Respondents threaten such action. Respondents did not even seek (since it was not necessary) to obtain the judicial enforcement upheld in *Hardy*. Respondents had an agreement with "an employer in the construction industry." The agreement, as the Board itself found, was one "relating to the contracting or subcontracting of work to be done at the site" of construction. Respondents' action, strictly pursuant to the agreement, amounted to no more than persuading or insist-

ing that the Employer "comply with a binding contractual agreement". *NLRB v. Operating Engineers (Engineers Ltd.)*, *supra*.

This case does not present the issue whether agreements otherwise valid under the construction industry exemption may be effectuated by strikes or picketing with or without union inducement. Compare *NLRB v. Plumbers Local 217 (Carvel Co.)*, 361 F.2d 160, 163-164 (1st Cir. 1966); *NLRB v. Bricklayers Local 5 (Greater Muskegon Assn.)* 65 LRRM 2563 (6th Cir. 1967).

Another recent decision by the Supreme Court involved a Union which threatened and imposed fines on its members, and sued to collect such fines, when they crossed Union picket lines and returned to work during a strike authorized by the Union. The Seventh Circuit held that the Union violated Section 8(b)(1), making it an unfair labor practice for a labor organization "to restrain or coerce" employees in the exercise of their right under Section 7 "to refrain from" concerted activities. *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656. The Supreme Court reversed, upholding the Union action in the light of the proviso stating that Section 8(b)(1) shall "not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". U. S. Sup. Ct., 35 L.W. 4623 (decided 6/12/67).

The *Allis-Chalmers* decision arises under a different statutory provision from that involved in the instant case. However, it supports our contentions herein that statutory language such as "coerce" and "restrain" must be read as words of art, in the particular context of the Congressional purpose; and that provisos to such wording must equally be given full force and effect as intended by Congress.

The Board's brief errs in equating a "threat" to rescind, under the termination clause, with "coercion" proscribed by Section 8(b)(4)(ii)(B). Since the construction industry

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exemption admittedly validates the subcontracting clause applicable to work at the construction site, the supporting clause permitting actual rescission in case of violation thereof is no less valid. *A fortiori*, Respondents had the legal right to insist that Ets-Hokin comply with the subcontracting clause or face the consequence of rescission. Since the Act does not bar judicial enforcement, presumably it would not bar compliance negotiated by the parties after filing an enforcement suit or a rescission suit but before judicial judgment. *A fortiori*, the Act does not bar compliance obtained under a contract clause without resorting to the courts. In this context, Section 8(b)(4)(ii)(B) prohibits only *concerted* "self-help" in the form of strike or picketing or threat thereof, under circumstances not involved in the instant case.

The history of litigation under Section 8(e) lays bare the Board's basic hostility to the construction industry proviso. In *Colson & Stevens* and in *Hardy, supra*, the courts rejected the Board's erroneous views on "coercion" based on the Board's refusal to heed the statutory language and purpose. Here, as in those cases, "reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. . . . The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress". See *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965).

It should be noted in the instant case that the Trial Examiner formulated his theory of "coercion" on the basis of the decision of the District Court in the *Hardy* case, later reversed by the United States Court of Appeals for the Fifth Circuit.

B. THE BOARD ERRED IN CONCLUDING THAT RESPONDENTS VIOLATED THE ACT BY ALLEGED "SYMPATHETIC ACTION" OUTSIDE THE GLEN CANYON CONSTRUCTION SITE.

The Board found that "the contracting clauses are found only in contracts with the IBEW applicable to the construction industry and that Ets-Hokin was performing the type of work found in the contract" (R. 120). The Board's brief in this Court states (p. 2) that "the unfair labor practices . . . occurred at the Glen Canyon Dam Construction site in Northern Arizona within this judicial circuit." The charges and the complaint herein concern the impact of the agreement and the action at the Glen Canyon site, specifically centering on the subcontract to Rose-Phoenix. The Board concluded that Respondents had violated Sections 8(e) and 8(b)(4)(ii)(A) and (b) and by their agreement and action relating to Rose-Phoenix at the Glen Canyon site (R. 119-124), separate and apart from the alleged "sympathetic action" beyond the confines of Glen Canyon.

It is true that under the agreement with Local 769, any violation by the contractor "will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union" (Art. II, Sec. 8). However, only IBEW President Freeman could make the finding of fact upon the basis of which the Local could cancel or threaten to cancel the agreement. The Decision included the unsupported conclusion that—

"by canceling its collective bargaining agreement with Ets-Hokin because of violation of the subcontracting clause, Local 769 could have practically forced Ets-Hokin out of business in the whole United States. The threat of contract cancellation was therefore a powerful private sanction to insure compliance with the subcontracting clause" (R. 120).

There is no finding or evidence whatever that the Respondents threatened to picket or strike the Glen Canyon project or any other Ets-Hokin projects throughout the

country; or to refuse to refer applicants for jobs at Glen Canyon or elsewhere; or to force Ets-Hokin or Rose Construction Company out of business in Arizona or elsewhere.

NLRB v. News Syndicate Co., 365 U.S. 695 (1961).

The above quoted Board conclusion is directly contrary to the only mention of this issue in the entire record:

“Q (By Mr. Mast to Mr. Ets-Hokin) Now, from your experience in the building-and-construction trades, and specifically in contracting in this area, what would be the effect, the practical effect . . . of the revocation of an agreement, a nation-wide agreement with the IBEW?” (Tr. 33)

Counsel for Local 769 objected to the question on the ground that “the answer would be speculative at the very best” (Tr. 33). The Trial Examiner sustained the objection:

“TRIAL EXAMINER: I am inclined to agree with that unless Mr. Mast has some specific thing in mind on which you can predicate an inference that Mr. Ets-Hokin anticipated some specific result as coincidental with the termination of his national agreement in effect with the IBEW, so that the objection to the last question which you put is sustained, Mr. Mast” (Tr. 45)

The objection was also sustained to Respondent IBEW (Tr. 34). Indeed, there is no evidence that any other Local threatened to cancel its agreement with Ets-Hokin or even knew of the Rose-Phoenix dispute. Nor is there any evidence to show that any other Local Union of the IBEW notified any other employer of any difficulties with Ets-Hokin.

The Board's quotation from Respondent's supplemental memorandum below (R. 120) is taken out of the entire context of that memorandum which completely negatives the Board's speculative and unwarranted conclusion. The memorandum further stated:

"In summary, while the battle cry of 'no contract, no work' may be highly appealing from a journalistic point of view—and may even actually represent the position of certain unions in certain industries in a bygone era—there is no evidence in the record to show that this catchphrase in any way represented the attitude of the IBEW or Local 769 *vis-a-vis* Ets-Hokin during the period in litigation. In point of fact, probably no union imposes greater restrictions on strike action than the IBEW. See *Parks v. IBEW*, 52 LRRM 2281 (CA 4, 1963).

"In the *Parks* case, a local union of the IBEW and certain of its members sought to set aside the revocation of the local's charter by the International. The revocation action complained of was taken by the IBEW after the local's members went out on strike without the International's approval, and failed to return to work in defiance of the International President's repeated directions to do so. The Fourth Circuit upheld the revocation action.

"The important point is that the local's strike took place at a time *when there was no operative contract in effect between the IBEW and the employer involved*. See *Local 28, IBEW v. Maryland Chapter, NECA*, 48 LRRM 2285 (USDC Md., 1961). Nevertheless, the International Union ordered work to continue, further rebutting the General Counsel's bland assertions as to the inevitability of strike action. The fallacy of the "no contract, no work" slogan is conclusively demonstrated in the case of the IBEW by this judicial decision of which the Board must take judicial notice.

"Certainly in the framework of such a union, where any strike action is so rigidly controlled, unfounded statements concerning the inevitability of such action against Ets-Hokin are not to be lightly tossed about".

In these circumstances, the supplemental memorandum continued:

"If the Board were to rule that the legal act of rescission of an agreement is illegal in itself, then the Board would be frustrating the unquestionably legal operation of the 8(e) proviso contracts of the IBEW.

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It is undisputed here that an employer can agree to such a clause and that he may honor his obligation. As we have seen, the Fifth Circuit Court of Appeals has ruled that he may be required by legal decree not to breach his obligation. If the Board rules, however, that a breach of the 8(e) proviso contract by an employer such as Ets-Hokin cannot be made the subject of rescission, then how will the 8(e) proviso contracts with other contractors be applied? Would not the Board be forcing the union to put contract breakers in the same category as those who honor their contracts?"

The Board's unsupported conclusion is also contrary to uncontroverted Exhibit 2 put in evidence by the General Counsel, which lists Ets-Hokin's uncompleted jobs as of April 1, 1963, in its capacity as *prime contractor* for numerous large U. S. or State governmental enterprises and numerous large private enterprises throughout the United States. It is absurd to conclude that Respondents were in position to take this business away from Ets-Hokin or force it out of business throughout the United States. The "contractor's clause" in question could only affect Ets-Hokin as a subcontractor—not as a prime contractor. Obviously, "contractor clauses" cannot be made the subject of agreements with the State and Federal Governments or public utility corporations.

The undisputed facts in the entire record, therefore, contradict the Board's unsupported inferences that Respondents threatened destruction of Ets-Hokin's operations throughout the United States.

In any event, the Board's legal position on "coercion" is contrary to the legislative intent and to settled precedents. *Supra*, pp. 8-22; cf. *Suburban Tile Center, Inc. v. Rockford Council*, *supra*; *Int'l Brotherhood of Teamsters (Alexander Warehouse Co.)*, 128 NLRB 916, 918-919, 46 LRRM 1409 (1960); *Case No. F-228*, Adm. Ruling of General Counsel, 41 LRRM 1140 (1957); see also *Houston Insulation Assn. v. NLRB*, 386 U.S. 664 (1967).

IV. The Board Erred in Refusing to Find that Respondents Were Entitled to Terminate the Agreement Because the Davis-Bacon Act Was Violated on the Glen Canyon Site

A. ROSE-PHOENIX FLAGRANTLY VIOLATED THE DAVIS-BACON ACT ON THE SITE

Attached to the specifications in the contract entered into between Ets-Hokin and Rose-Phoenix (IBEW Exh. 6) are the rates of pay which were to be paid for the work in question to the employees involved, pursuant to wage determinations by the Secretary of Labor under the Davis-Bacon Act. The specifications also contained the correct classifications for the employees on the job; e.g., "iron workers" who are engaged in their trade doing work such as "reinforcing," "structural" and "ornamental" iron work; laborers, describing typical labor work on all types of construction jobs; and "Line Construction," such as linemen, equipment operators, and equipment mechanics. The wage rates for the latter employees are substantially higher than those for employees classified as iron workers or laborers. Actually they are identical with those included in the IBEW contract with Ets-Hokin. Compare the rates in the contract of S. W. Line Constructors (G.C. Exh. 8), assented to by Ets-Hokin (G.C. Exh. 7) with the rates and specifications required for Glen Canyon (IBEW Exh. 6). The subcontractor was also required to acknowledge that he has read the said determination by the Secretary of Labor and is fully familiar with them; to execute a Prevailing Wage Certificate as a prerequisite to any payment from the contractor; and to post a copy of the applicable prevailing wage determinations; and to meet other requirements regarding apprentices and the like (G.C. Exh. 17).

On the other hand, the agreement between Rose-Phoenix and Operating Engineers Local 428 provided for payment of the iron worker and laborer rates (Tr. 282); that is,

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rates substantially below the legally applicable rates under the Davis-Bacon Act. The Bureau of Reclamation expressly found that Rose-Phoenix was violating that Act, and directed compliance (Resp. IBEW Exh. 7). Respondents repeatedly advised Ets-Hokin of such noncompliance (Tr. 88, 95, 101).

B. RESPONDENTS WERE ENTITLED TO RESCIND THE AGREEMENT ON THAT GROUND

The United States Constitution and applicable Federal laws are part of every contract made, and the law thus embraced in such contracts affects the validity, construction, discharge and enforcement of the contract. See 17A C.J.S. *Contracts*, para. 330, pages 229, 301 (1963). Similarly, every contract implies that the parties thereto will do and perform those things which, according to reason and justice, they should do in order to effectuate the purpose for which the contract was made. Conversely, there is an implied agreement to refrain from doing those things which will destroy or injure the other party's right to receive the fruits of the contract. *Id.*, at para. 328. As stated in *Williston on Contracts*:

"The underlying principle [of conditions] is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." (Sec. 670).

For example, in *Watson Brothers Transportation Company v. Jaffa*, 143 F. 2d 340 (8th Cir. 1944), the defendant leased to plaintiff all rights under his interstate trucking franchise. The parties then submitted their agreement to the Interstate Commerce Commission for approval. The Commission ordered them to submit further documents before approval could be given. Plaintiff requested that defendant execute such documents, but defendant refused and, instead sold the same rights to another. Plaintiff

brought suit asking specific performance to force the defendant to execute the necessary papers. The District Court dismissed the action and, on appeal, the Eighth Circuit reversed. The Court noted that there was no express provision in the contract requiring the defendant to cooperate in securing the approval of the Commission, but stated that a contract contains not only express provisions, "... but in addition all implied provisions indispensable to effectuate the intention of the parties and to carry out the contract, and in the absence of which the contract could not be effectively performed" (143 F. 2d at 348). To determine the applicability of this principle, the Court said that one must examine the nature of the contract, the circumstances under which it was made, the situation of the parties and the object that each had in making the contract. In the light of these factors, the Court held that the cooperation of the defendant in securing Commission approval was implied. See also *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 329 (1927).

By reason of Rose-Phoenix's deliberate violation of the Davis-Bacon Act, Ets-Hokin breached this implied condition of his agreement with Respondents. Since this breach was material, and went to the essence of the agreement, Respondents were entitled to elect to rescind.

The Board agreed that "under the Davis-Bacon Act the general contractor is responsible for the subcontractor's meeting the Davis-Bacon rates in the contract" (R. 122); but argued that this was not "the sole, or even the main, reason" for canceling the agreement. This finding is unsupported by substantial evidence on the record as a whole. The undisputed evidence established that the Davis-Bacon Act violation was one of the two separate grounds for termination advanced by Respondents (Resp. Exh. 7; GC Exh. 4; Tr. 350); and that Rose-Phoenix made only temporary and half-hearted efforts to comply with the directive by the Bureau of Reclamation (Tr. 325-326).

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CONCLUSION

For the foregoing reasons, the Board's petition for enforcement should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined the provisions of Rules 18 and 19 of this Court, and that in my opinion, the foregoing brief is in full compliance with these Rules.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

-vs-

FEDERICO GONZALEZ CRUZ,

Defendant and Appellant.

NO. 11119

OPENING BRIEF
OF
FEDERICO GONZALEZ CRUZ

APPEAL FROM

UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION
HONORABLE ALFONSO J. ZIEPOLL, JUDGE

FEDERICO GONZALEZ CRUZ
P. O. BOX 107
Temecula, California 92590
In Propria Persona for Defendant-
Appellant Federico Gonzalez Cruz

FILED

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WM. B. LUCK, CLERK

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1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3
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5 THE PEOPLE OF THE STATE OF CALIFORNIA, }
6 Plaintiff and Respondent, }
7 -vs- } NO. 21619
8 FEDERICO GONZALEZ CRUZ }
9 Defendant and Appellant, }

10
11 Appeal from the United States District Court For The Northern
12 District of California, Southern Division, Honorable Alfonso
13 J. Zirpoli, Judge
14

15
16 OPENING BRIEF

17 OF

18 FEDERICO GONZALEZ CRUZ
19

20 TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES
21 OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT
22 COMES NOW the Defendant and Appellant,
23 FEDERICO GONZALEZ CRUZ, and files this Opening Brief.
24
25
26

STATEMENT OF THE PLEADINGS AND FACTS

That this appeal has merits and under the provisions of the rules and regulations governing the District Courts and the Courts of Appeals, this court has jurisdiction under "(28 U.S.C.A., #2243) to review this case. That the facts in this case shows that a constitutional issues under Escobedo, exist in this appeal. re: Escobedo v. Illinois, 378 U. S. 478 (1964). The remaining allegations of this appeal has sufficient evidences to raise a federal constitutional issue under the provisions of the United States Constitution specially the 5th and 6th Amendment as make obligatory upon the states by the 14th Amendment of the United States Constitution. That this defendant was not given a fair trial as guarantee by the United States Constitution and that this defendant was not represented by counsel during his trial constitutes another violation of the right to counsel guarantee by the United States Constitution. That the facts in this case shown that this court has jurisdiction because this case show that a constitutional issue under Gideon, exist in this appeal. Re: Gideon vs Wainright, 372 U. S. 335. That this defendant was interrogated by the police without the assistance of counsel and without being notified of his right to counsel and inflammatory statements were used against him during the trial.

PRELIMINARY STATEMENT

The defendant in this case and appellant was charged by an Information filed by the District Attorney of the County of Los Angeles with the following offenses:

In Count I, the crime of Conspiracy to commit grand theft, in violation of # 182, Subds. 1 & 4, Penal Code, State of California, in that the defendant and appellant Federico Gonzalez Cruz did, on or about the 22nd day of July, 1960, conspire, combine, confederate and agree with Roland Causey and with unknown persons to commit Grand Theft, to cheat and defraud by criminal means, and to obtain money and property by false pretenses and by false promises, with fraudulent intent not to perform such promises, but thereafter, and in pursuance of said conspiracy, combination, confederacy and agreement, and to carry out the objects and purposes of the same, the defendant committed certain overt acts. Thereafter, the overt acts are alleged in the Information (CT 1-4).

In Count II, the defendant Cruz was with Causey charged with Grand Theft, in violation of # 487, Subd. 1, Penal Code, in that on or about the 25th day of July, 1960, they obtained two diamond rings of the value of Ten Thousand Dollars and two watches of the value of Seventeen Hundred Dollars, all of the value of Eleven Thousand and Seven Hundred (\$11,700.00) Dollars, the personal property of one Charles DeMaio. (CT 5).

1. In Count III, they are charged with violation
2. of # 487, Subd. 1, Penal Code, Grand Theft, in that
3. they did take Five Thousand Dollars in money, the personal
4. property of Hill's Acceptance Corporation and Melvin B.
5. Rogow.

6. In Count IV, defendants Causey and Cruz are
7. charged with Grand Theft, in violation of # 487, Subd. 1,
8. Penal Code, in that on or about September 29, 1960, they
9. did take Five Thousand Dollars in money from the Realty
10. Capital Company and Leon Lapin (CT 7).

11. In Count V, defendant Cruz is charged with having
12. obtained, in violation of # 487, Subd. 1, Penal Code of
13. California, Grand Theft, Seven Thousand Two Hundred Dollars
14. in money, the personal property of Michael Schiller (CT
15. 8).

16.
17. To the indictment, each of the defendants entered
18. pleas of "Not Guilty." (CT 10)

19. The trial was an extended one with a jury. Both
20. defendants-appellants represented themselves at the trial
21. without counsel. At the conclusion of the trial, the
22. defendants were convicted; Causey was convicted of con-
23. spiracy to commit grand theft as charged in Count I; Cruz
24. was convicted of conspiracy to commit grand theft as
25. charge in Count I; Causey was found guilty of grand theft
26. in violation of #487, as charged in Count II; Cruz was

1. found guilty of grand theft in violation of P 487, Penal
2. Penal Code, as charged in Count II of the Information;
3. Causey was found not guilty of grand theft as charged in
4. Count III; Cruz was found guilty of grand theft as charged
5. in Count III; Causey was found not guilty of grand theft
6. as charged in Count IV; Cruz was found guilty of grand
7. theft as charged in Count IV; Cruz was found guilty of
8. grand theft as charged in Count V (CT 87,88).

9. Motions for new trial were made and denied (CT
10. 73); Cruz' motion for new trial was denied (CT 82).

11. Cruz was sentenced as to Counts I and IX to the
12. penitentiary to run consecutively; on Counts III, IV and
13. V to run concurrently with Count II (CT 83).

14. Thereafter, a Notice of Appeal was duly filed
15. and the case. (CT 84).

17. STATEMENT OF THE CASE

18. During my trial I have no Attorney in violation of my
19. Constitutional Rights to counsel. Denial of the assistance
20. to counsel is in violation of the Sixth Amendment of the
21. Constitution as made obligatory upon the State by the Fourteenth
22. Amendment, Gideon vs Wainwright, 372 U. S. 335.

23. At the time of my arrest when I was brought to the Los
24. Angeles Police Headquarters I requested permission to call an
25. Attorney before given any statements and the Police Officer Hull
26. denied me the right to make a telephone call to an attorney. I

1. try for about four times for permission to get to see an attorney
2. and the Police denied me this right guarantee by the Constitution.
3. Miss Helena P. Reichl was present when the right to counsel was
4. denied to me. During the trial she testified as follow in Volume
5. 36, Reporter's Transcript, pages 4929, 4930, August 14, 1961.
6. Direct Examination of Helena P. Reichl.
7. Q Just before you left, was there a conversation before you left?
8. A Yes
9. Q Who was there?
10. A Lieutenant Hull, Dr. Cruz and I.
11. Q And what was said in this conversation?
12. A Well, Dr. Cruz wanted to call an attorney.
13. Q And was Dr. Cruz able to call an attorney that day?
14. MR. FAGAN: That calls for a conclusion.
15. MR. CRUZ: I will withdraw it and will reframe it.
16. Q BY MR. CRUZ: Did you see Dr. Cruz making a telephone conver-
17. sation that day?
18. A No
19. Q And did you know who did not let Dr. Cruz make a telephone
20. conversation that day?
21. A The Police
22. Q And who was representing the police that day?
23. A. Lieutenant Hull
24. Q Did Lieutenant Hull recommend anything that day in your
25. presence?
26. A Yes

1. Q What did he recommend?

2. A Well, Dr. Cruz wanted to get out on a writ that night, and
3. Lieutenant Hull told me to go to the bonding agency, Schwinn.

4. Q He told you to go there?

5. A Yes

6. Q Is there anything else you remember that happened that day?

7. A Yes

8. Q Were any threats made against you that day?

9. A Yes, Lieutenant Hull threatened me that I might be deported.
10. He said it many, many times, and he also said that under no
11. circumstances I should get in touch with an attorney and that
12. never shall see Dr. Cruz again, and this one time I could be
13. excused, because I didn't know where I was standing or in what
14. I was in, but the next time that they see me with Dr. Cruz again,
15. then it would be unforgivable and then I would, for sure land in
16. jail too.

17. Q Now, was this at the police station that day?

18. A Yes

19. Q And after that day, did Lieutenant Hull threaten you on any
20. other occasion?

21. A Well, it was the deportation question, I was scared.

22. As the court can see in the above testimony that I was
23. denied of the right to counsel and I was not allow to make a phone
24. call for getting in touch with an attorney and even my friend that
25. could get me an attorney was threaten and scared from do do by
26. the police officers. Effective representation by counsel at the

1. only stages when legal aid and advice would help him, Massian vs.
2. United States, _____ U. S. _____. The guiding hand of counsel
3. was essential to advise petitioner of his rights in the delicate
4. situation, Powell vs. Alabama, 337 U. S. 45, 69.

5. I was brought before Officer Lawrence W. Sloan, Examiner of
6. questioned documents, employed by the Los Angeles Police Department.. I requested permission to call for counsel to assist me
7. before I make any statement and Mr. Sloan denied me assistance
8. of counsel, instead it went to threat me with additional charges
9. and putting my family and friend Miss Reichl in jail and he went even
10. to the extent of showing me, Miss Reichl in the next room, after all
11. this threat and after he told me that this statement will help
12. me to clear myself up I give a statement and I signed and I
13. keep signing a great number of other documents. That Mr. Sloan never
14. advise me of my constitutional rights to counsel and to remain
15. silence, instead used all his power to threat me into signing
16. a confession. The moment a person becomes a prison suspect in
17. an investigation, he has the right to consult with counsel and
18. no statement at all prior to counsel can be admitted as evidence,
19. Escobedo vs. Illinois, 378 U.S. 478 (1964). The result to produce
20. upon his mind that fear that if he remained silent it would be con-
21. sidered an admission of guilt, Bram vs. United States, 168 U.S. 532,
22. 562. It seems manifested to us from the indisputed evidence and
23. the circumstances surrounding defendant at the time of statement
24. and shortly prior thereto that the defendant understood he would
25. be permitted to go home if he gave the statement and would be
26.

1. granted an immunity from prosecution, Jacobado vs. Illinois, 38
2. Ill. 2nd. 41, compare Lynum vs. Illinois, 373 U. S. 520. It was
3. stage as critical as was the arrangement, Hamilton vs. Alabama,
4. 368 U. S. 52. In a recent case entitled the People vs. Matterson,
5. 61 A. C. _____, 61 Cal. 2d _____, 1964, the same officer Mr.
6. Sloan was reprimended for using this same tactics in said case and
7. the case was reversed by the California Supreme Court.

8. During my trial Mr. Sloan was called as the People's
9. witness and he testified as follow as recorded in Volume 27,
10. Reporter's Transcript, pages 3652, 3653 and 3654, Direct
11. Examination By Deputy District Attorney Fagan; Line No. 15.
12. Q BY MR. FAGAN: Thereafter, did you compare that signature with
13. certain other documents?

14. A Yes I did

15. THE COURT: What did he answer when you asked if it was his
16. signature?

17. THE WITNESS: He said, "Yes, it is."

18. THE COURT: When was that

19. THE WITNESS: I don't recall the date, your Honor. I think I have
20. some other documents in this case, initialed and dated. I did not
21. initial or date this one in particular. This, among other docu-
22. ments, were in my office, as well as Mr. Cruz, the defendant. It
23. is now several months ago. It seems to me that it goes back to
24. the very early part of this year. I don't quite remember, but
25. these documents, Exhibit No. 37, I did show to the defendant and
26. asked, "Is this your signature?"

1. Independent of one another and collectively, I asked that and he
2. said, "Yes" and that is how his initials happened to get on the
3. paper.

4. I asked if he would initial them as documents that I had shown
5. him and documents that he has seen, and he readily acquiesced.

6. MR. CRUZ: To which I object and ask the answer be stricken unless
7. this police officer can prove here with other documents that this
8. is the signature of Dr. Cruz. This is hearsay all the way. He
9. doesn't even know when it was done.

10. THE COURT: Overruled, The answer may stand.

11. These initials that you refer to are what.

12. THE WITNESS: "G.C."

13. THE COURT: Now, will you point out the signature when you asked
14. if it was his signature?

15. THE WITNESS: This one on the short form, a portion of Exhibit
16. No. 37, and this in the lower right portion of the long form.

17. THE COURT: Now, will you point out the initials that he put on
18. after you asked him to put them on?

19. THE WITNESS: "G. C." in the lower right hand corner of the short
20. portion of Exhibit No. 37 and "G. C." in the lower right hand
21. corner of the long form of Exhibit No. 37.

22. THE COURT: Do that so these jurors or anybody can see what we are
23. doing. Hold it up so we know that you are referring to.

24. The above testimony was a direct violation of my constitutional
25. rights because, No statement at all prior to counsel can be
26. admitted as evidence, Escobedo supra., People Vs Durado supra.

1. Confessions have often been extorted to save law enforcement officials
2. the trouble and effort of obtaining valid, independent evidence.
3. Haynes vs. Washington, 373, U. S. 503, 519.

4. While in custody at the Los Angeles County Jail, Hall of
5. Justice, I was questioned by Lieutenant Hull and Mr. Herman F.
6. Roth, a deputy Real Estate Commissioner, assisting in the inves-
7. tigation of the case, about the case. I told them I wanted to see
8. my counsel and the police officer told me that it was not necessary
9. and that I should better talk nor or additional charges were
10. going to be filed against me. Lieutenant Hull told me that he
11. wanted this information to clear me up and to arrest Mr. Roland
12. Causey. After all this threats and talk I give them a statement
13. or confession. That at no time did these officers advise me of
14. my constitutional rights to counsel and to remain silent, and that
15. this constitute a direct violation of my constitutional rights to
16. counsel. Every state of denial of a request to contact counsel
17. (is) an infringement of the Constitutional Rights, without regard
18. to the circumstances of the case, Crooker vs. California, 337,
19. U. S. 433, See i.g. Escobedo supra, Gideon Supra.

20. During my trial Mr. Roth was called as the People's
21. witness and he proceed to use the statement or confession that he
22. took from me while at County Jail. He testified as follow as
23. recorded in Volume No. 27, pages 3693 through 3695, Reporter's
24. Transcript of July 31, 1961: Direct Examination by Deputy District
25. Attorney Fagan: Line 18-

26. Q BY MR. FAGAN: Did you have a conversation with the defendant Cruz

1. A Yes
2. Q And when did that conversation take place?
3. A May I refresh my recollection on that?
4. Q Do you have some memorandum on that subject matter?
5. A Yes, I do
6. Q And has that already been shown to you and given a number?
7. A No. 93
8. Q And were these notes that you took following your conversation
9. or during your conversation with the defendant Cruz?
10. A Yes
11. THE COURT: You laid your foundation on that perfectly. You
12. found out that it was a statement from Mr. Cruz.
13. MR. FAGAN: I did all right, except I was using Causey instead
14. of Cruz, your Honor.
15. Q BY MR. FAGAN: Now, No. 93 is a typed up summary of the notes
16. that you had in connection with the conversation you had with
17. Mr. Cruz, is that right?
18. A Yes
19. Q Done at a time when it was fresh in your mind?
20. A Yes
21. Q And do you believe that the matter recited there in are an
22. accurate description of the conversation had with Mr. Cruz.
23. A Yes
24. Q All right. Do you feel you need it to refresh your recollec-
25. tion from time to time for the sake of accuracy?
26. A Yes

1. Q All right. Use it if you have to then, but only if you have to.
2. When did you have a conversation with the defendant Cruz.
3. A On November 23rd.
4. Q of 1960?
5. A Yes
6. Q Where did the conversation take place?
7. A In the Hall of Justice
8. Q And were Mr. Cruz's statements freely and voluntarily made?
9. A Yes
10. Q Who was present during the conversation you had with Mr. Cruz?
11. A Lt. Hull, Mr. Cruz, and myself.
12. Q Will you relate what was said by you and Lt. Hull and what was
13. said by Mr. Cruz?
14. The witness then went to give detail of all the information in
15. the statement or confession given by the defendant in violation
16. of my constitutional rights (RT 27)
17. The defendant was denied a fair trial guaranteed to him
18. by reason of the misconduct of the District Attorney, which I
19. urge was sufficiently aggravated to command a reversal of the
20. judgement and orders appealed from herein. The trial was
21. extended; there was such repetition; considerable delay; and
22. a summary of the facts has been prepared on the attached Exhibit
23. B (which accompany the Petition #43329 to the United States
24. District Court, Northern District of California) and I respectfully
25. ask the Court to adopt the points, the summary of evidence, and
26. the authorities, cited in Exhibit B, and I refer to them and

1. make them a part of my contentions here by reference, and
2. respectfully ask the Court to adopt them insofar as they are
3. applicable to the appeal.

4. Defendant was given double punishment in violation of
5. Section 654, California Penal Code and the Constitution of the
6. United States. Said Judgement reads in pertinent part:

7. "Sentences as to Counts 1 and 2 are ordered to run
8. Consecutively. Sentences as to Counts 3, 4 and 5 are
9. ordered to run concurrently with Count 2."

10. (Superior Court File No. 237700 for the County of
11. Los Angeles.)

12. At the time of the imposition of said sentence
13. on October 23, 1961, the Honorable Samuel L. Blake stated:

14. "Counts 1 and 2, they will run consecutively.
15. Counts 3, 4 and 5 to run concurrent with Count 2."

16. "I divided them up. I believe they are one offense
17. in that connection, and I have run them that way,
18. giving him the benefit of running concurrently, the last
19. four Counts, which, I think, is part of the same trans-
20. action. I think he is entitled to that."

21. (R.T. of sentencing - Superior Court File No. 237700 for
22. the County of Los Angeles)

23. As the result of the above sentence defendant has to serve
24. 20 years for the same crime because as the Judge stated above
25. they are one offense in that connection and the conspiracy
26. involves the same overt acts as the grand theft, being double jeopardy

REASONS FOR REVERSAL

I

THE DEFENDANT WAS NOT REPRESENTED BY COUNSEL
DURING THE TRIAL.

II

DEFENDANT WAS NOT ALLOWED TO CONTACT COUNSEL
DURING HIS DETENTION, INFLAMMATORY STATEMENTS
WERE TAKEN FROM HIM WITHOUT THE ASSISTANCE
OF COUNSEL, STATEMENTS WERE USED DURING THE
TRIAL, AND DEFENDANT WAS NOT ADVISED OF HIS
RIGHTS TO COUNSEL AND REMAIN SILENCE.

III

THE DEFENDANT WAS DENIED THAT FAIR TRIAL
GUARANTEED TO HIM BY REASON OF THE MISCONDUCT
OF THE DISTRICT ATTORNEY, WHICH WE URGE WAS
SUFFICIENTLY AGGRAVATED TO COMMAND A REVERSAL
OF THE JUDGEMENT AND ORDERS APPEALED FROM HEREIN

IV

THE DEFENDANT WAS GIVEN DOUBLE PUNISHMENT FOR
THE SAME CRIME WHILE CO-DEFENDANT RECEIVED SINGLE
PUNISHMENT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

1. ARGUMENT

2.
3. I

4.
5. DEFENDANT WAS NOT REPRESENTED BY COUNSEL
6. DURING THE TRIAL
7.

8. Defendant was a layman of the law and did not understand
9. well court proceedings and at the time he waived his right to
10. counsel, he did not know what he was doing. When his attorney
11. asked for permission to be released from the case he got more
12. confused, his attorney prior to his motion for withdrawal had
13. spoken to him and threaten him about sure imprisonment if he does
14. not released him from staying in the case. Defendant had given
15. all his money to this attorney to represent him and was not
16. financially capable of re-hiring another attorney and with the
17. threats from his attorney confusing him, he went along with the
18. withdrawal of his attorney from the case, however, the Judge was
19. in error when he permitted the removal of my attorney from the
20. case because after all he was retained already for this case and
21. was the attorney of records. Defendant should have given another
22. attorney to represent him or the Judge should not have allowed
23. this attorney from withdrawn from the case. That this case was
24. a very confused one and another attorney coming into the case
25. which had make it more delay and the Judge had refused a
26. continuance of the case which was one of the reasons why my

1. attorney wanted out because the District Attorney keep saying about
2. how many months this case was going to last. I argued that this
3. was the reason the Judge allowed my attorney to withdraw from the
4. case. If defendant had been represented by counsel the outcome
5. of the case will probably being different and do to the court error
6. the defendant was improper represented and lost the case.

7. "Denial of the assistance to counsel is in violation
8. of the Sixth Amendment of the Constitution as made obligatory
9. upon the State by the Fourteen Amendment, Gideon vs Wainright,
10. 372 U.S. 335."

11. "In all criminal prosecutions, the accused shall
12. enjoy the right to a speedy and public trial, by an imp-
13. arcial jury....., this amendment also guarantees that
14. the defendant shall have a fair trial and be represented
15. by counsel at all stages of proceedings." Amendment VI
16. to the Constitution of the United States.

17. "It is obligatory made upon the States to support
18. all the amendments and the Constitution of the United
19. States, Amendment XIV to the United States Constitution."

21. II

22. DEFENDANT WAS NOT ALLOWED TO CONTACT COUNSEL DURING ~~THE~~
23. DETENTION, INFLAMATORY STATEMENTS WERE TAKEN FROM HIM WITHOUT
24. THE ASSISTANCE OF COUNSEL, STATEMENTS WERE USED DURING THE
25. TRIAL, AND DEFENDANT WAS NOT ADVISED OF HIS RIGHT TO
26. COUNSEL AND REMAIN SILENCE.

1. Defendant was not given the rights guarantee to him by
2. the United States Constitution as you can see by the testimony
3. of Helene P. Reichl (RT 36). When defendant tried to contact
4. counsel police officers denied this right and not even a phone
5. call was allowed. Miss Reichl was admonished about getting in
6. touch with an attorney and threaten if she did so. (RT 36) That
7. the police tried everything in their power to prevent defendant
8. from getting into touch with an attorney to protect his rights. That
9. officer Sloan used threats and police trickery to get a confession
10. from the defendant (RT 27). That during the trial Mr. Sloan
11. produced in open court the papers that he made the defendant signed
12. under threat and Mr. Sloan demonstrated in open court where defendant
13. had put his signature admitting guilt in Exhibit No. 37 and the
14. Judge requested to show this exhibit to the juror (RT 27). That
15. Mr. Roth produced in open court the statement or confession that
16. they extorted from the defendant without the assistance of counsel
17. and under threats and was marked Exhibit No. 93 and admitted in
18. evidence and that Mr. Roth was allowed to use the statement to
19. refresh his recollection in open court and in front of the jury. (RT
20. That this statement was not taken voluntarily but under threats of
21. the police officer Hull and Mr. Roth and that these two officers
22. refused to let defendant to get into touch with his attorney that was
23. in the building during this interrogations. That using Exhibit
24. No. 37 in open court was a violation of my constitutional rights
25. and the court was in error when allowed this to take place. That
26. Officers Hull, Sloan and Roth failed to advise defendant of his

1. constitutional rights to counsel and to remain silence at any time
2. during his interrogations in violation of defendant's constitutional
3. rights as guarantee to him by the Constitution of the United States.

4. "Effective representation by counsel at the only stages
5. when legal aid and advice would help him, Massiah vs United
6. States, ____ U.S. ____."

7. "The guiding hand of counsel was essential to advise
8. petitioner of his rights in the delicate situation,
9. Powell vs Alabama, 287 U.S. 45, 69."

10. "The moment a person becomes a prime suspect in an
11. investigation, he has the right to consult with counsel
12. and no statement at all prior to counsel can be admitted
13. as evidence, Escobedo vs Illinois, 378 U. S. 478 (1964)."

14. "The result to produce upon his mind that fear that
15. if he remained silent it would be considered an admission
16. of guilt, Bram vs United States, 168 U. S. 532, 562,"

17. "It seems manifested to us from the undisputed evidence
18. and the circumstances surrounding defendant at the time
19. of statement and shortly prior thereto that the defendant
20. understood he would be permitted to go home if he gave the
21. statement and would be granted an immunity from prosecution,
22. Escobedo vs Illinois, 38 Ill. 2nd. 41, compare Lynum vs
23. Illinois, 372 U.S. 528."

24. "It was stage as critical as was the arrangement,
25. Hamilton vs Alabama, 368 U. S. 52."

26. "Confessions have often been extorted to save law

1. enforcement officials the troubles and effort of obtaining
2. valid, independent evidence, Haynes vs Washington, 373,
3. U. S. 503, 519."

4. "Every state of denial of a request to contact counsel
5. (is) an infringement of the Constitutional Rights, without
6. regard to the circumstances of the case, Crooker vs California,
7. 337, U. S. 433."

8. "Confession taken from defendant during period of
9. detention prior to indictment after attorney has been
10. requested and denial access to him could not be used
11. against him in a criminal trial, People vs Donovan, 13
12. N. Y. 2nd. 143."

13. "It seems manifested to us from the undisputed
14. evidence and the circumstances surrounding defendant at
15. the time of statement and shortly prior thereto that the
16. defendant understood he would be permitted to go home if
17. he gave the statement and would be granted an immunity
18. from prosecution, Escobedo vs Illinois, 28 Ill. 2nd. 41,
19. compare Lynn vs Illinois, 372 U.S. 528."

20.
21. III

22. THE DEFENDANT WAS DENIED THAT FAIR TRIAL GUARANTEED TO HIM
23. BY REASON OF THE MISCONDUCT OF THE DISTRICT ATTORNEY, WHICH
24. WE URGE WAS SUFFICIENTLY AGGRAVATED TO COMMAND A REVERSAL
25. OF THE JUDGEMENT AND ORDERS APPEALED FROM HEREIN.
26.

1. That the District Attorney taking advantage that the
2. defendant was acting in proper abused the discretion of the
3. court and subjected the defendant to many hours of trickery and
4. did not acted as an opposing counsel at all. The District
5. Attorney told the defendant to "shut up" three times in open
6. court in the present of the jury and used all kind of language
7. in refering to the defendant during the trial and his conduct
8. was very unprofessional like and was cited in contempt of court
9. by the presiding judge. That the District Attorney discriminated
10. against the defendant during the trial producing great embarrassment
11. before the jury at all time preventing the defendant from getting
12. a fair trial. The trial was extended; there was much repetition;
13. considerable delay; and all because of the misconduct of the
14. District Attorney. A summary of the evidence has been prepared
15. by the defendant in Exhibit B #43329 District Court which I
16. respectfully ask to adopt. It is lengthy and, in the interest
17. of brevity, I respectfully asks permission of the Court to adopt
18. it as being a summary of the evidence on behalf of the Appellant
19. Cruz.

20. IV
21.

22. THE DEFENDANT WAS GIVEN DOUBLE PUNISHMENT FOR THE SAME
23. CRIME WHILE CO-DEFENDANT RECEIVED SINGLE PUNISHMENT
24. IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

25. In passing sentence the Judge gives the defendant his
26.

1. time running consecutively for the crime of conspiracy and grand
2. theft which were the same crime with the same overt acts and both
3. related to each other and part of the same transaction. (C. T. 83
4. sentencing - Superior Court File No. 237700 for the County of Los
5. Angeles) That the co-defendant Causey received a concurrently
6. sentence for the same crime as defendant and that the court was
7. in error and discriminated against defendant and violated the
8. statutes of unequal punishment of the Constitution of the United
9. States for the same crime. (R. T. sentencing - Superior Court
10. File No. 237700 for County of Los Angeles, Defendant Causey)(CT 82)

11. "Where there are other and additional objectives of a
12. of a conspiracy which are not charged as separate substantive
13. offenses, sentences imposed as to both the conspiracy and the
14. substantive offenses do not violate the double punishment concept
15. precluded by Section 654 of the Penal Code."

16. "Though one substantive crime charged against the prisoner
17. (Count V of Information) was not alleged or proved to be an
18. objective of the conspiracy and was charged only as to the
19. defendant and not as to the co-defendant, no objectives of the
20. conspiracy were either alleged or proved which were not also
21. charged as substantive offenses, People vs Causey, 220 CA2d 641,
22. 34 CalRptr 43." (1964)

23. "Where, however, the conspiracy is not shown to have
24. any objective apart from that involved in the substantive
25. charges, double punishment is forbidden, People vs Scott,
26. (1964) 224 CA2d 146, 36 CalRptr 402."

1. "The Keller Decision speaks in terms of the "one
2. objective" test, but defendant contends that the logic of
3. the holding is equally applicable if there are multiple
4. objectives so long as there are no objective of the conspiracy
5. separate and different from those charged as substantive offenses.
6. People vs Keller, (1963) 212 CA2d 210, 27 CalRptr 805."

7. New York apparently subscribes to a rule which
8. holds, in part, that if there is an act which itself violates
9. one statute and is also a material element of the violation
10. of another, there can be only a single punishment,
11. People vs Jackson, (1957) 2 NY2d 259, 264."

12. CONCLUSION

13. That the defendant appeal was final on September of
14. 1963, but the case remained open until August 11, 1964, when
15. defendant was committed to state prison (CT August 11, 1964)
16. and that all the time defendant was in further appeal and relieves
17. from the Court and this makes defendant appeal retroactive under
18. the Escobedo Decision Supra and his case should be considered
19. in this relation. I respectfully ask the Court to adopt the points,
20. the summary of evidence, and the authorities, cited in the Exhibit
21. B of #43329 USDC, and I refer to them and make them a part of my
22. contentions here by reference, and respectfully ask the Court to
23. adopt them insofar as they are applicable to the appeal of Gross.
24.
25.

26. For the reasons stated, the defendant-appellant

1. FEDERICO GONZALEZ CRUZ respectfully asks the Court that the order
2. and judgments appealed from be reversed, and to that end
3. appellant will ever pray.
4.

5. Respectfully submitted,

6. FEDERICO GONZALEZ CRUZ
7. In Propia Persona
8.

9. I certify that, in connection with the preparation of
10. this brief, I have examined Rules 18, 19 and 39 of the United
11. States Court of Appeals for the Ninth Circuit, and that, in my
12. opinion, the foregoing brief is in full compliance with those rules.
13.

14.
15. FEDERICO GONZALEZ CRUZ
16. In Propia Persona
17.
18.
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23.
24.
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26.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SETSUKE M. GEIS,)
)
Appellant,)
) NO. 21424
vs.)
)
UNITED STATES OF AMERICA)
and MASAKO GEIS,)
)
Appellees.)

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, JUDGE

PETITION FOR REHEARING IN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SETSUKE M. GEIS,)	
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Appellant,)	
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ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, JUDGE

PETITION FOR REHEARING IN BANC

Pursuant to Rule 40, Rules of Appellate Procedure,
respondent Masako Geis petitions the Court for a rehearing en
banc.

Petitioner contends the Court overlooked or misapprehended the following points of law and fact:

FACT

1. The fact that the deceased Walter Geis clearly intended his second wife, Masako Geis, to have every benefit to which he was entitled whether he knew of its existence or not.

(Finding of Fact No. 11)

2. The fact that it is a logical impossibility to require a service man to do an overt act regarding a benefit which he reasonably believes does not exist.

3. The fact that the retention, custody, and review of insurance records is in the hands of the Veteran's Administration and the requirement of an overt act of intent should only be imposed when these records clearly demonstrate the deceased was aware of the scope of his benefits.

LAW

1. The Court failed to give proper effect, under the circumstances, to the policy stated in Mitchell v. U.S., 165 F. 2d 758 (5th Cir. 1948), and cited with approval by this Court in Behrens v. U.S. 299 F.2d 662 (9th Cir. 1962). That policy is to "brush aside technicalities" when "intention to change the beneficiary is proved to the hilt" (as the majority opinion admits was done in this case).

2. The Court failed to give the proper weight to the decision of the Veteran's Administration, which concluded that the deceased had sufficiently demonstrated his intent. Their decision is to be reversed only for "clear and compelling reasons." Owens v. U.S. 251 F.Supp 114, 118 (D.S.C. 1966)

3. The Court has applied the rationale of Behrens, supra, (where the decedent knew of his benefits) to a situation where the weight of evidence -- and the trial court's findings of fact -- indicate he did not know his insurance was in force.

ARGUMENT ON FACTUAL POINTS

ONE THROUGH THREE

The trial court's finding of fact number 11 states:

"11. Although the insured was unaware of his National Service Life Insurance in the several years immediately preceding his death and believed that the insurance had lapsed, after considering all of the evidence the Court finds that the insured had no intent that Setsuko Geis receive any of his benefits, and that he did intend his wife Masako receive all benefits to which he was entitled, including any National Service Life Insurance in force.

The Court further finds that the insured did everything reasonably necessary under the circumstances to effectuate that intent, and that his affirmative acts were sufficient to change the beneficiary of his National Service Life Insurance policy from Setsuko Geis to Masako Geis."

In its majority opinion, the Court states it is convinced that if Geis had known he had insurance benefits, he would surely have changed them over to Masako.

THE MAJORITY THUS ADMITS INTENT TO
BENEFIT ONLY MASAKO IS CLEARLY DEMON-
STRATED; BUT DECLINES TO GIVE THIS INTENT
ANY EFFECT.

In its opinion, the majority is placing the burden of knowing his insurance status on the service man, although no actual insurance policy is ever issued to him or placed in his possession, and the custody, review and administration of his insurance program is by law in the hands of the Veteran's Administration.

Yet, when this Administration fails to adequately inform
the service man of his insurance status, the persons whom he
clearly intends to benefit must bear the loss.

ARGUMENT ON LEGAL POINTS
ONE THROUGH THREE.

In its majority opinion, the Court never considers the weight to be given the decision of the Veteran's Administration,

although this point was argued both in the trial court and the appellee's brief. (Brief of Appellee Geis, p. 14) The Veteran's Administration found that the decedent Geis had the requisite intent and had overtly demonstrated this intent to make Masako Geis the recipient of his insurance benefits.

On numerous occasions, this court has stated the administrative decision must be upheld even though this court, had it been the trier of fact, might have ruled differently.

THERE IS NO CLEAR OR COMPELLING
REASON FOR REVERSING THE DECISION OF THE
VETERAN'S ADMINISTRATION.

Secondly, the court applies the Behrens requirements to the facts at bar, even though it was conclusively shown that the decedent was not aware that his NSLI policy was still in force.

Rather than brush aside technicalities, the
court adds another; namely, that the decedent
be at all times aware of his insurance status.

The only information Geis had from his "insurance company" was an ambiguous communication six years before he died (Exhibit #2). He received no premium notices, no literature, no inquiries, no letters, no communication of any

sort between 1956 and 1962. In many states, one is allowed to presume a wife is dead when she has disappeared for seven years. Was it unreasonable for the decedent to presume his insurance was "dead" when he had heard nothing for six years?

WHERE THE DECEDENT IS NOT AWARE OF
HIS INSURANCE, THE COURT SHOULD
EFFECTUATE HIS CLEARLY MANIFESTED
GENERAL INTENT.

The majority fails to do so.

Respectfully submitted,

CASEY & PRUZAN

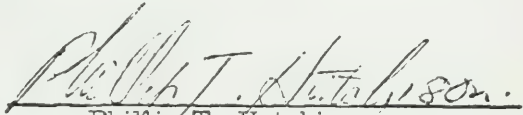
By

Phillip T. Hutchison
Phillip T. Hutchison

Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.



Phillip T. Hutchison
Of Counsel for Appellee.

See Vol. 3473

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

MORGAN GUARANTY TRUST COMPANY, TRUSTEE
AND TRANSFEREE OF THE ESTATE OF
ROBERT RODGER GLEN, DECEASED, and
ESTATE OF ROBERT RODGER GLEN, DECEASED,
CLAIRE HUNTINGTON GLEN, EXECUTRIX,

Respondents

ON PETITION FOR REVIEW OF THE DECISIONS OF
THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

FILED

NOV 9 1967

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,431

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

MORGAN GUARANTY TRUST COMPANY, TRUSTEE
AND TRANSFEREE OF THE ESTATE OF
ROBERT RODGER GLEN, DECEASED, and
ESTATE OF ROBERT RODGER GLEN, DECEASED,
CLAIRE HUNTINGTON GLEN, EXECUTRIX,

Respondents

ON PETITION FOR REVIEW OF THE DECISIONS OF

THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

I

DECEDENT DID NOT RECEIVE CONSIDERATION IN MONEY OR
MONEY'S WORTH UPON ESTABLISHING THE TWO TRUSTS BE-
CAUSE HIS WIFE'S RELINQUISHMENT OF MARITAL RIGHTS
CAME WITHIN THE PROHIBITION OF SECTION 2043(b)

Taxpayers attempt to justify the result reached below and
avoid the clear language of Section 2043(b) by contending that
the principles of E.T. 19, 1946-2 Cum. Bull. 166 and Rev. Rul.
60-160, 1960-1 Cum. Bull. 374 govern the instant case. (Br. 10-
15.) They argue (Br. 12) that these rulings "are not distinguish-
able on any rational or logical basis" from the facts at bar.
However, it is readily apparent from the record that the two trusts

in question were neither established in satisfaction of Jane Glen's support rights nor under the compulsion of the court decree.^{1/} Clearly, the Commissioner's rulings have no specific application to this case. Moreover, we fail to see how their "rationale" can be employed to the taxpayers' advantage. Contrary to taxpayers' implied assertions, there is a rational distinction between a property settlement which is incorporated in a divorce decree where the court has the power to vary its terms and one that is not so incorporated. When two parties submit their property agreement to a divorce court for approval and incorporation in the decree, the possibility that the court will disregard their terms and substitute its own makes any indebtedness created out of the settlement one which is founded completely upon the court decree and not upon any "promise or agreement." Surely the parties take a real risk in submitting their property settlement to a divorce court, and it is this risk that merits a difference in estate tax treatment. We maintain that this distinction is the teaching of the Supreme Court in Harris v. Commissioner,

1/ Our position with respect to the inapplicability of these rulings to the present case because of the absence of support rights to a divorced wife under Scottish law and the absence of incorporation of the property settlement in the decree is set forth in greater detail at pages 27-31 of our opening brief. Taxpayers' invocation of the "depletion theory" of E.T. 19 (Br. 10, 15-18) is misplaced since it is clear that property rights upon divorce are rights in capital under Scottish law (I-R. 206) and are therefore intended as a substitute for extinguished inheritance rights. Taxpayers' arguments (Br. 17) to the effect that the divorce need not have taken place or that it might have been brought in another jurisdiction are speculative and were rejected as such by the Tax Court. (I-R. 211-213.)

340 U.S. 106, and is the basis upon which Rev. Rul. 60-160 was promulgated.

Furthermore, we object to taxpayers' characterization of Jane Glen's rights under Scottish law as a "presently existing obligation." (Br. 12.) There is nothing in the record which conclusively establishes that she was entitled to one-third of decedent's personalty. The stipulation as to the law of Scotland existing in 1938 merely states abstract propositions and does not make reference to Jane Glen directly. Cf. stipulation, par. (c). (I-R. 206.) It is indeed strange if Jane Glen could have in fact obtained \$333,333 outright, that she would not have done so instead of settling for an interest valued at \$190,131.

Conceding that the holding below constitutes an "exception" to previously developed precedent, taxpayers contend that the unique facts of this case with regard to Scottish law support the decision reached by the Tax Court. (Br. 14.) We submit that the facts at bar are not nearly as unique as taxpayers presume, since the law of Arkansas, Maine, and Rhode Island contain provisions almost identical to that of Scotland.^{2/} Certain states, such as Kentucky, have judicially established equivalents of a reasonable divorce settlement, which are followed in most cases. See Estate of O'Nan v. Commissioner, 47 T.C. 648, 656-657. In addition, certain community property states such as California and Louisiana

^{2/} See 3 B Arkansas Statutes, 1947 Annotated (1962 Replacement), Section 34-1214, 10 Revised Statutes of Maine, 1954, Annotated Title 19, Section 721, and 3 General Laws of Rhode Island, Section 15-5-6.

provide for equal division of the community under most circumstances. ^{3/} Finally, it is the Commissioner's contention that apart from the incorrect application of Scottish law by the Tax Court majority, its holding constitutes an impermissible extension of the rule of Harris v. Commissioner, supra, and an erroneous interpretation of Section 2043(b). By limiting the application of Section 2043(b) to the marital rights of a surviving spouse, the decision below clearly impairs the effectiveness of Section 2036 in taxing life estates retained in connection with a divorce settlement. ^{4/}

II

THE VALUE OF THE SON'S INTERESTS UNDER THE TWO TRUSTS CANNOT SERVE AS CONSIDERATION FOR THE TRANSFERS MADE BY DECEDENT

It is the Commissioner's position, as set forth at pages 40-46 of our opening brief, that even if the Tax Court was correct in holding that Jane Glen's relinquishment of marital rights constituted consideration, only the value of the interests she actually received can serve as consideration. ^{5/} The only interest she

^{3/} See Civil Code, 6 West's Annotated California Codes, Section 146, and 1 West's Louisiana Statutes Annotated, Civil Code, Art. 156

^{4/} Contrary to taxpayers' contention (Br. 22), we do not view the fact that the transfers were not subject to United States gift tax in 1938 as significant.

^{5/} Taxpayers urge that the Commissioner has conceded this point (Br. 32-33) because of the language in the Petition for Review. (I-R. 275). Clearly, there has been no concession and taxpayers cannot claim that they have been unfairly surprised. Cf. Bank of America Nat. Trust & Savings Ass'n v. Commissioner, 126 F. 2d 48 (C.A. 9th). This contention was raised in the Tax Court, appears

received was a life estate in the Jane S. Durand Trust valued at \$190,131. Taxpayers argue that the allocation of the value of the son's interests as consideration by the Tax Court can be supported on the incorporation of Section 2516 into the estate tax (Br. 25-26) and by the bargaining by Jane Glen on behalf of her son which they contend is evidenced in the record (Br. 30-31).

With respect to the incorporation of Section 2516 into the estate tax, we believe that this argument is adequately covered in our opening brief at pages 35-40. However, we wish to emphasize that even if incorporation of this gift tax provision in its entirety into the estate tax were effected, no part of the transfers in trust other than Jane Glen's life interest could serve as consideration. See Section 2516(1). However, the transfers for the benefit of the son could not qualify since it is clear that the interests created for him were not intended to provide a support allowance during his minority. In this respect, it appears that the Tax Court majority concurs with our position. (I-R. 227.)

Moreover, contrary to taxpayers' contentions, we continue to urge that the record in no way supports the inference that Jane Glen bargained on behalf of her son so as to "transfer" to him the excess of her alleged rights to one-third of decedent's

5/ (continued)

in the Commissioner's Statement of Points (I-R. 279) and in the Specification of Errors Relied Upon in our opening brief at page 12. The function of the Petition for Review is essentially a notice to the parties and the courts that a review will be taken. Its language should not foreclose this Court from considering this point. See Forman v. Davis, 371 U.S. 181-182.

personalty over the interests she actually received.^{6/} There is nothing in the testimony or in Exhibit 8 which would support an inference that decedent created the Robert Story Glen Trust (wherein additional interests for the son were created) at the insistence of Jane Glen. On the contrary, Exhibit 8 states "Further to protect the son, Major G. is to carry out his indicated intention of creating another trust fund ..." (Emphasis supplied.) Given the fact that decedent created the Scotch Trust for his son's sole benefit prior to the commencement of negotiations, it would appear that he needed no prompting to create the Robert Story Glen Trust. In any event, taxpayers having had the burden of proof, have failed to establish that Jane Glen bargained on behalf of her son. Estate of Keller v. Commissioner, 44 T.C. 851.^{7/}

Respectfully submitted,

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Assistant Attorney General.

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NOVEMBER, 1967.

6/ As we have pointed out supra, it is far from clear that Jane Glen had an absolute right to \$333,333, or one-third of decedent's personalty.

7/ Furthermore, the testimony (II-R. 36-37) relied upon by taxpayers (Br. 31) that decedent created the Robert Story Glen Trust in exchange for a limited life estate in the Jane S. Durand Trust is totally unrealistic. Had Jane Glen received a full life interest in the latter trust, it would have been worth approximately

(Continued on next page)

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of November, 1967.

Attorney

7 / (continued)

\$208,000. (I-R. 238.) However, what she ultimately received was valued at \$190,131. Surely, decedent would not have created additional interests in his son worth \$68,460 (I-R. 244) in consideration of decreasing his wife's interests by approximately \$18,000. The disparity between these two amounts casts considerable doubt upon the accuracy of the cited testimony and clearly negatives any inference of a "bargaining" situation. These figures are accurate in view of the fact that the record does not reveal that Jane Glen's plan for remarriage was known to decedent at any time prior to its occurrence. (I-R. 253, fn. 2.)

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N O S. 2 1 4 3 5 & 2 1 4 3 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. RUSSELL PENNY,
State Supervisor, etc.,

Appellants,

vs.

SEP 18 1968
/
No. 21435

THE DREDGE CORPORATION,

Appellee.

E. J. PALMER,
State Supervisor, etc.,

Appellants,

vs.

No. 21436

THE DREDGE CORPORATION,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
UNITED STATES DISTRICT COURT FOR NEVADA

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N O S. 2 1 4 3 5 & 2 1 4 3 6
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vs.

No. 2 1 4 3 6

THE DREDGE CORPORATION,
Appellee.

PETITION FOR REHEARING

Comes now the Dredge Corporation, a Nevada Corporation, the appellee in both cases, herein, by George W. Nilsson, its attorney and prays that this Court grant a rehearing in both cases to determine questions of law and fact hereinafter set out, and to correct the inequities created by said decision.

These questions grow out of the decision herein of this

Court dated June 26, 1968. The appellee presents this, its petition for rehearing, and in support thereof respectfully shows:

(a) Was the so-called "marketability at a profit" test ever published in the Federal Register? If not, it is invalid under the Administrative Procedure Act, (5 U. S. C. 552).

(b) Does the sand and gravel covered by the Dredge claims have "distinct and special value" within the meaning of the mining laws.

(c) Does the definition of "Common Varieties" by the Department of the Interior dated September 7, 1962 and published in 27 Federal Register on September 14, 1962, exclude the Dredge Corporation's sand and gravel from "common varieties" even though there is sand and gravel found in the area outside the claims?

(d) Since the Common Varieties Act excludes any mineral otherwise a common variety, if the deposit includes other minerals, evidence should be taken to determine whether the Dredge claims contain any other minerals, because this question was not put in issue by the Complaint in Contest, or tried before the Hearing Examiners because the Common Varieties Act was not an issue in the contest.

(e) The phrase "marketability at a profit" is unconstitutional because it is vague, indefinite and uncertain. At the Contest hearing both "market" and "profit" were proved.

THIS COURT SHOULD TAKE JUDICIAL
NOTICE OF THE FOLLOWING:

The Supreme Court of the United States in its decision of April 22, 1968, United States v. Alfred Coleman, states that the "Marketability at a Profit" test is " * * * a logical complement to the 'prudent man test' * * * ". This new test is then an addition or amendment to the prudent man rule, and under the Administrative Procedure Act (5 U. S. C. §552) (1946) should have been published in the Federal Register.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time almost every year. They are entitled "Lode and Placer Mining Regulations". Appellees procured one such pamphlet before starting their locations in 1952. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit". One pamphlet is entitled: "Mining Claims; Questions and Answers". It is dated 1963. We quote from the bottom of page 3 and at the top of page 4:

"There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. Commercial grade ore is not required but mere traces, isolated bits of mineral or minor indications are

not sufficient to satisfy the 'prudent man' rule."

(Emphasis added)

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit". We call attention to the following language in the above quotation: "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit".

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

In the various pamphlets referred to, a careful examination will show that "marketability at a profit" is not referred to, so that the public knows nothing about it after reading the government pamphlets and, based thereon, locating mining claims under the old, well known, "prudent man" test.

The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States in a number of cases; one of the latest decisions being Best v. Humboldt Placer Mining Company, 371 U.S. 334 (Jan. 14, 1963), with no reference to "marketability at a profit".

The "marketability at a profit" test being an addition to the prudent man rule in order to be of legal effect would have to

have been published in the Federal Register as provided by the Administrative Procedure Act, 5 U.S.C. §552 (1946), particularly subsection E which provides that:

" * * * each amendment, revision or repeal of the foregoing"

must be so published

Said §552 further provides:

"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

Since the "marketability at a profit" test was not published by the Department of the Interior in the Federal Register to inform the public how to locate mining claims on the public domain, is not publicized in pamphlets, said test is illegal and ineffective as to Dredge Corporation's problems in these cases.

THIS COURT SHOULD ALSO TAKE JUDICIAL NOTICE OF THE DEFINITION OF COMMON VARIETIES AS PUBLISHED BY THE DEPARTMENT OF THE INTERIOR ITSELF. SUCH DEFINITION IS CONTAINED IN AN AMENDMENT TO REGULATION 185.121(b), ISSUED UNDER DATE OF SEPTEMBER 7, 1962 AND PUBLISHED IN THE FEDERAL REGISTER OF SEPTEMBER 14, 1962 AT PAGES 9137-38. IT CONTAINS THE FOLLOWING WORDS:

"Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation."

This was recognized by this Court in its opinion in the case of United States v. Alfred Coleman, et al., dated June 21, 1966, 363 Fed. 2d 190 at 199:

"The Department's 'quantity equals common variety' formula is not consistent with either the letter or the spirit of the 1955 statute, and represents a departure from the earlier and, * * * "

Subparagraph (b) of the regulation as published in 27 Federal Register of September 24, 1962 is attached hereto as EXHIBIT "A".

The above amended definition of common varieties is now subparagraph (b) of §3511.1 of 43 Code of Federal Regulations. In the revision of January 1, 1966 this appears at page 626.

Evidence should now be taken in a new contest proceeding to determine whether the Dredge Corporation sand and gravel is not a common variety because it comes within the exception quoted above from the amended regulation dated September 7, 1962 and published in 27 Federal Register on September 14, 1962.

It is the fact that the Dredge claims were located in 1952, long prior to the passage of the Common Varieties Act in July 1955 and therefore by the terms of that law were excluded from its provisions.

In addition to this fact, the Complaints in Contest which initiated these proceedings were dated October 28, 1955, approximately three months after the passage of said Act, but did not contain any charge under this Act.

Under these facts the Department of the Interior was precluded from asserting the Common Varieties Act in any of the proceedings or decisions. To permit such use by the Department of the Interior is unconstitutional as depriving the Dredge Corporation of due process of law. This is an additional reason that a rehearing be granted herein and a new contest ordered.

Since the matter of Common Varieties was not included in the hearings before the hearing examiners Dredge Corporation had no opportunity to present any evidence to show that its sand and gravel was not a common variety. In order to show this the Dredge Corporation should be given the opportunity, in a new Contest proceeding, to present evidence proving that its sand and gravel does have "distinct and special value" and thus is not a



"common variety".

The Common Variety Law, 30 U.S.C. §611 contains the following exception:

" * * * Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. * * * " (Emphasis added.)

As Dredge Corporation's sand and gravel does contain other minerals, it should be given the opportunity to prove this by the presentation of evidence of that fact in a new Contest proceeding, which it could not at the contest hearings because the Common Varieties Act was not in issue in the Contest proceedings before. See copy of assay marked Exhibit "B" and attached hereto.

III.

THE DEPARTMENT OF THE INTERIOR IN THE
SUMMARY OF ITS DECISION DATED DECEMBER
29, 1959, BY THE DEPUTY SOLICITOR ON
APPEAL TO THE SECRETARY STATED:

"To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void. "

There was no such charge in the contest complaint and that question was not raised at the hearing. Therefore, it was NOT an issue.

What does "market" mean, and what does "profit" mean?

The testimony before the hearing officers was that Dredge Corporation sold sand and gravel from time to time for years at a price which was more than it cost to produce it.

Dredge Corporation proved profit. It certainly had to make a profit right along so it could continue to work and develop the property for many years. This is proof of profit. Its work and sales increased the value of its mining claims which also proved profits.

What does "market" mean, and what does "profit" mean in the additional clause "marketability at a profit" which the Department has illegally added to the prudent man rule? The term is vague, indefinite and uncertain.

The Supreme Court of the United States has repeatedly declared laws invalid because they are vague and uncertain. In the term of that court just closed there are at least two cases which decide this question.

(a) Zwickler v. Koota, 389 U.S. 241 (Dec. 5, 1967), 88 Supreme Court Reporter, p. 391.

(b) Interstate Circuit Inc. v. City of Dallas, decided April 27, 1968, 88 Supreme Court Reporter 1299, 1303.

For another late case on vagueness, see Keyishian v. Regents of New York University, in connection with the New York loyalty oath law, 385 U.S. 589, 87 Supreme Court Reporter 675 (decided January 1967).

The term "marketability at a profit" is not only illegal because never published in the Federal Register, it is also

unconstitutional and void because it is vague, uncertain and indefinite.

IV

THE COURT REFUSED TO TAKE INTO ACCOUNT THE LOSS OF EXHIBITS IN BOTH OF THESE CASES.

This Court states in its decision (page 7):

"The Corporation argues that the district court judgment setting aside the agency decision should be affirmed because the agency records are faulty and incomplete. We have looked into this matter and find the contention to be without merit. The omissions are minor, have no relevance to the issues before us, and are not, in our view, prejudicial."

There is nothing more important to prove the presence of mineral and its value than the samples of ore from a mining property. These samples of ore were part of the exhibits in each case and were lost while in the possession of the Department of the Interior.

This Court stated in its opinion herein (page 6):

"On his review of the hearing examiner's decision in the Palmer case, the Director of the Bureau reviewed the evidence adverted to by the examiner and found to the contrary concerning the value of the deposits on these six claims. Among other things, the Director found, in effect, that even in the claim Number 54 area, which was

potentially the most valuable in this group, the gravel is coated with a calcareous substance and is used only for road, parking lot and fill purposes . . . " (Emphasis added).

The Director of the Bureau of Land Management did not have the Dredge Corporation samples of sand and gravel (Exhibits) and consequently did not know whether the Dredge Corporation sand and gravel was coated with a calcereous coating or not. He could not make a visual examination of the sand and gravel samples (Exhibits) because they had been lost and were not before him.

The Secretary of the Interior acting through a deputy Solicitor on appeal likewise could not examine these samples and this Court could not examine them to see for itself that there was not, and there is not, a calcareous coating on the said sand and gravel from these Dredge claims.

The purpose of introducing the samples of sand and gravel as exhibits was to refute any such claim.

This clearly shows that the loss of these samples is highly relevant to the issues in these cases and their loss is very prejudicial to the rights of appellee Dredge Corporation.

In a new contest, if ordered by this Court, appellee can introduce evidence to prove its sand and gravel is of high grade.

To proceed otherwise is prejudicial and is not due process.

What can be lost if a new contest is ordered by this Court? The Government would surely suffer no impairment of its rights. Only the appellee will suffer by a denial herein to a new contest

hearing on the issues raised.

V

THIS COURT HAS NOT DISPOSED OF ALL
THE ISSUES BEFORE IT IN THESE TWO
CASES.

This Court stated in its decision:

" . . . Since, however, the agency record and the contentions of the parties with respect to the sufficiency of the evidence are fully before us, and in view of the length of time which has transpired since the Palmer and Penny contest proceedings were initiated in 1955 and 1957, we elect to proceed with the appeals and determine all of the issues at this time." (Emphasis added.)

Appellee in its brief (page 2) stated:

"A further significant fact is that the decision of the Secretary in Case No. 366 was consolidated with and made a part of a decision in unrelated contest proceeding (The Clear Gravel Co.) in which the Dredge Corp. had no connection or interest and was not a party.

"This merging in the Secretary's decision of two different and unrelated contest proceedings was improper and prejudicial to Dredge Corp. The two

contest hearings involved were held on two different dates and covered two different and entirely separate mining properties owned by two different companies. This action by the Secretary was sufficient to have caused the District Court to reverse the Secretary's decision in Case No. 366 on this gross error alone."

This Court did not determine this important point in appellee's Case No. 366 (This Court's number 21435).

The Secretary in his consideration and decision violated Dredge Corporation's constitutional right to a fair and impartial determination on its appeal on the evidence of its Contest proceeding alone. The decision of the Secretary was merged with another Contest proceeding held on a different date in which Contest, evidence was introduced by a different Contestee which had no bearing on the Dredge Corporation claims. No doubt samples of sand and gravel were introduced at that contest which the Secretary may have viewed as belonging to Dredge Corporation.

This may be the answer to the contention by the Director of the Bureau of Land Management and of the Secretary that the sand and gravel of the Dredge Corporation contained a calcareous coating. Neither of these two officials ever saw the Dredge Corporation samples (exhibits) of sand and gravel.

It is significant that the Hearing Examiner who admitted the samples as exhibits and examined them, found six of the claims valid and the sand and gravel of fine quality.

Contrary to the statement of this Court in its opinion at

at page 6 above quoted regarding the six claims and the decision of the Director of the Bureau of Land Management, the following is a portion of the decision of the Hearing Examiner based on the evidence before him:

" . . . Although many trenches and pits had been dug, none of the workings was of great depth except the operating Wells Cargo pit extending into Dredge Nos. 54 and 55. Hardpan was also found at the bottom of the pits.

"There was, however, additional evidence which must be considered in a determination of the validity of these claims. Material had been removed from four of the claims, hauled to the plant for processing, and sold. Immediately adjacent to the claims and extending into Dredge Nos. 54 and 55 is a gravel pit and operating sand and gravel plant which produced 152,106 tons of base material and 21,480 tons of asphaltic concrete in 1955, and 48,000 tons of crushed gravel base material and 81,875 tons of asphaltic concrete in 1956. Mr. Stone testified that the character, content, and geology of the lands embraced within the claims in the third group are similar to those of the land upon which the Wells Cargo pit are located. Mr. Hartman testified that the laminated material encountered within the pit was not caliche or cemented gravel and that it is

not detrimental when found in material used in asphaltic concrete.

"As the contestee has shown that the material from the existing pit can be removed and sold at a profit, and as it has been shown that the material in the adjacent claims in the third group is of like quality to that found in the operating pit, I find that a prudent man would be justified in developing these claims.

"The testimony of Mr. Starr Hill, Jr. and of Mr. Lovejoy, to the effect that only a few of the existing operating sand and gravel plants were in actual operation when they were visited in an attempt to show that the market for sand and gravel in the Las Vegas valley is already adequately supplied, was effectively refuted by the contestee's exhibits showing that the business activity and construction activity in the Las Vegas valley did not decline during 1956 but, on the contrary, increased, and that the expectation was that it would increase still more in the ensuing years.

"I therefore conclude that Dredge Nos. 52, 53, 54, 55, 56 and 57 are valid claims." (Emphasis added.)

The Director of the Bureau of Land Management neglected to discuss in his decision the fact that Dredge Claim No. 55 was a

part of the operating pit of Wells Cargo Co. the same as the southwest quarter of Dredge No. 54 which was excluded from the contest as being valid.

Since the southwest quarter (25%) of Dredge Claim No. 54 is admitted to be valid and was not contested, the whole of Claim No. 54, was and is valid because the Supreme Court of the United States and other courts have held that only one discovery is required to validate all of an association placer mining claim.

The same argument applies to Dredge Claim No. 55 since it like Dredge Claim No. 54 is a part of the operating pit of Wells Cargo Co. who is lessee of all six claims Nos. 52, 53, 54, 55, 56 and 57. See Title 30 United States Code Annotated (Mineral Lands and Mining), page 322, Note 3, where numerous cases are cited in support of this principle.

Denial to Dredge of title to these two claims, Dredge Nos. 54 and 55, is taking its property without due process of law and is unconstitutional.

Justice demands that a rehearing be granted herein and that a new contest be ordered.

Great weight is usually given by this Court to the findings on the evidence by the trial court (Hearing Examiner) because that court has the opportunity to observe the demeanor of the witnesses, the appearance of the exhibits, and the credibility of the evidence, etc.

In any event, two separate cases, involving two entirely separate contestees, with Contest proceedings on different dates;

with evidence of a different nature and extent involving mining properties miles apart, should not be considered jointly by the Secretary of the Interior and the cases merged into a single decision. This is unconstitutional and is not due process and a new Contest proceeding should be ordered by this Court to get the facts straight for the Dredge Corporation. (See copy of summary of the combined decision marked Exhibit "C" attached hereto.)

In another contest proceeding where the evidence was unsatisfactory and inconclusive the Bureau of Land Management, in its decision on appeal ordered a new contest and stated:

"Where the evidence as to discovery on mining claims is unsatisfactory and inconclusive, the case will be remanded for a further hearing."

United States v. Clark County Gravel, Rock and Concrete Co., Contests 3343, 061806, 061808, 064495 (Nevada), decided June 20, 1968.

Another Contest proceeding where a new hearing was ordered by the Department of Interior because of unsatisfactory and inconclusive evidence is United States v. Irving Rand, et al., A 30036 (October 19, 1964).

CONCLUSION

The questions raised in this petition are due principally to the fact that Dredge Corporation at the contest hearings did not have an opportunity to meet the questions now raised.

The charges in the contest complaints are not the basis of the decision by the Deputy Solicitor on appeal to the Secretary.

The question of the Common Varieties Act -- Public Law 84-167, passed July 23, 1955, was not charged in the contest complaint so Dredge Corporation had no opportunity to meet such issue. Therefore, that law should have no bearing on the decision of this case.

The reasons given by the Director of the Bureau of Land Management and by the Deputy Solicitor acting for the Secretary for reversal of the decision of the Hearing Examiner were based on issues that were not before the Hearing Examiner. Therefore, these reasons and reversal should have no bearing on this case.

The Supreme Court in the case of Ex rel Wilbur v. Krushnic, 280 U. S. 304 (1960), specifically decides that mining claims are property in the fullest sense of the word.

See also Secretary Seaton's decision in United States v. O'Leary, 63 I. D. 341, 345 (1956).

Dredge Corporation located its claims in 1952, long before the passage of the Common Varieties Act. That Act specifically applies only to mining claims located after its passage, therefore it should not be used in this case against Dredge Corporation

mining claims.

To permit the Department of the Interior to hold the Dredge mining claims to be void, for illegal and inapplicable reasons, is to deprive Dredge Corporation of its property without compensation and without due process of law, therefore such action is unconstitutional and void.

WHEREFORE, appellee Dredge Corporation prays:

1. That this Court grant a rehearing herein in both cases; and,
2. Such other relief as the Court may deem fitting and proper.

Respectfully submitted,

GEORGE W. NILSSON

Attorney for Appellee,
DREDGE CORPORATION

OF COUNSEL:

Deaner, Butler & Adamson

EXHIBIT "A"

Title 43—PUBLIC LANDS:
INTERIOR

Chapter I—Bureau of Land Manage-
ment, Department of the Interior

SUBCHAPTER I—MINERAL LANDS

[Circular No. 2089]

PART 185—GENERAL MINING
REGULATIONS

Common Varieties: Defined

Paragraph (b) of § 185.121 is revised
in its entirety as follows (and the foot-
note 2 is deleted):

§ 185.121 *Common varieties: defined.*

(b) "Common varieties" includes de-
posits which, although they may have
value for use in trade, manufacture, the
sciences, or in the mechanical or orna-
mental arts, do not possess a distinct,
special economic value for such use over
and above the normal uses of the gen-
eral run of such deposits. Mineral ma-
terials which occur commonly shall not
~~be deemed to be "common varieties" if~~
~~a particular deposit has distinct and~~
~~special properties making it commer-~~
~~cially valuable for use in a manufactur-~~
~~ing, industrial, or processing operation.~~
In the determination of commercial
value, such factors may be considered as
quality and quantity of the deposit, geo-
graphical location, proximity to market
or point of utilization, accessibility to
transportation, requirements for reason-
able reserves consistent with usual in-
dustry practices to serve existing or
proposed manufacturing, industrial, or
processing facilities, and feasible meth-
ods for mining and removal of the mate-
rial. Limestone suitable for use in the
production of cement, metallurgical or
chemical grade limestone, gypsum, and
the like are not "common varieties."
This subsection does not relieve a claim-
ant from any requirements of the mining
laws.

JOHN A. CARVER, Jr.,
Acting Secretary of the Interior.

SEPTEMBER 7, 1962.

[P.R. Doc. 62-0184; Filed, Sept. 13, 1962;
8:46 a.m.]

(Emphasis added)

Published in 27 F.R. September 14, 1962 - Effective upon publication.

Circular Distribution List

EXHIBIT "A"

EXHIBIT "B"

ASSAY CERTIFICATE

IBENHAUER JR.
HAUER RAYMOND
E EARL RAYMOND

Los Angeles, Calif. May 3/67 19__

I hereby Certify that the samples described below, received from

William A. McCall

assay as follows:

No. and Sample	GOLD		SILVER		TOTAL VALUE PER TON	PERCENTAGE	
	GRS. PER TON	VALUE PER TON	GRS. PER TON	VALUE PER TON		COPPER	LEAD
+1/8	.03	\$ 1.05	.60	\$.77	\$ 1.82		
20	trace		.10	\$k .12	\$.12		
	trace		.13	\$.15	\$.15		
8 +1/8	.05	\$ 1.75	.62	\$.80	\$ 2.55		
20	trace		.11	\$.13	\$.13		
	.005	\$.18	.19	\$.24	\$.42		
+1/8	.06	\$ 2.10	.71	\$.92	\$ 3.02		
20	trace		.08	\$.09	\$.09		
	trace		.12	\$.15	\$.15		
+1/8	.09	\$ 3.15	.66	\$.85	\$ 4.00		
20	trace		.06	\$.07	\$.07		
	trace		.09	\$.10	\$.10		
	.04	\$ 1.40	.51	\$.66	\$ 2.06		

PER OZ.

29 PER OZ.

C.

CHARGES \$ 52.00

Ed. Eisenhauer
ASSAYER

Established 1916

EXHIBIT "B"

EXHIBIT "C"

CLEAR GRAVEL ENTERPRISES, INC.
THE DREDGE CORPORATION, INC.

A-27967

A-27970

Decided

DEC 29 1959

Mining Claims: Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void.

Mining Claims: Discovery--Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

EXHIBIT "C"

No. 21,438

**United States Court of Appeals
For the Ninth Circuit**

ELINOR E. PETERSEN,

Appellant,

vs.

ALAMEDA WEST LAGOON HOME OWNERS'
ASSOCIATION, et al.,

Appellees.

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLEES

BURNHILL, RODE, MOFFITT & MOORE,

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FILED

MAY 26 1967

WM. B. LUCK, CLERK

JUN 12 1967

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No. 21,438

**United States Court of Appeals
For the Ninth Circuit**

ELINOR E. PETERSEN,

Appellant,

VS.

ALAMEDA WEST LAGOON HOME OWNERS'
ASSOCIATION, et al.,

Appellees.

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal by Elinor E. Petersen, appearing in propria persona, from an order by the United States District Court for the Northern District of California, Honorable Alfonso J. Zirpoli, Judge, which order dismissed her amended complaint and rendered judgment on the pleadings in favor of defendants.

Appellant filed her original complaint May 10, 1966, and thereafter, on June 15, 1966, filed her amended complaint. According to appellant's brief on this appeal, said action was brought for injunctive relief, damages, and to quiet title to certain real property

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described in said amended complaint. Appellant alleges that her title derives from a Spanish Land Grant guaranteed to her by the Treaty of Guadalupe-Hidalgo of 1848.

All defendants which had been served in said action jointly moved the Court for an order dismissing said amended complaint and for judgment on the pleadings. Said motion was made on the grounds that the amended complaint failed to state a claim upon which relief could be granted and that the District Court lacked jurisdiction of the subject matter of the alleged cause of action in said amended complaint.

Said motion was heard July 25, 1966, and granted September 19, 1966 by the Honorable Alfonso J. Zirpoli, District Court Judge. Appellant filed her Notice of Appeal on September 29, 1966.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM

(A) The Spanish Land Grant

After sorting out the verbose language of appellant's pleadings, appellant's claim is at best a claim to quiet title to real property. Any rights of appellant to an injunction or for damages rest entirely upon her alleged title to the premises described in her amended complaint. The only legal issue raised in her amended complaint is title to real property. It should be noted that the properties to which appellant claims title are tideland lots which were arti-

ficially filled by one of the appellee's predecessor in title, the South Shore Land Company.

It is not entirely clear how appellant claims title to the real property involved in this litigation, but she alleges that she derives title from an 1820 Spanish Land Grant to Don Luis Peralta, that her title was guaranteed to her by the Treaty of Guadalupe-Hidalgo, that her title was confirmed in the United States Patent granted Antonio Maria Peralta, a son of Don Luis Peralta, in 1874, and that through mesne conveyances, his interests have passed to her.

The appellant's claim therefor is exactly the same claim which she has litigated previously in *Elinor E. Petersen v. United States*, 327 F. 2d 219 (1964), and in *South Shore Land Company v. Elinor Petersen*, 230 CA 2d 628 (1964). In the above-mentioned cases, the claim of appellant to an interest in the same tidelands described in her amended complaint was rejected.

For the Court's edification, a brief history of the Peralta claims is presented.

On June 20, 1820, the Governor of Alta, California, delivered to Don Luis Peralta, a sergeant of the Spanish Army, a deed covering a large portion of what is now Alameda County, California. The deed described the boundary of the grant along San Francisco Bay as "profundo mar," or the bottom of the sea.

Mexican Independence from Spain in 1821 did not result in any change in the scope of the Spanish

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Grant. When the Mexican Government ceded California to the United States by the Treaty of Guadalupe-Hidalgo of 1848, provision was made to protect the property rights of Mexican citizens in the ceded territory.

In order to implement the treaty and provide for the orderly adjudication of the property claims of Mexican citizens, Congress in 1851 set up a United States Commission to hear and determine claims of the Mexican citizens. 9 U.S. Stat. 631. The Act provided for appeals to the federal courts from the decision of the commissioners, and for the grant of United States Land Patents to successful Mexican claimants.

Four sons of Don Luis Peralta presented claims to the Commission including Antonio Maria Peralta, appellant's alleged predecessor in interest. The claim of two of Don Luis Peralta's sons, Vincente and Domingo Peralta, was adjudicated, appealed to the District Court, and subsequently appealed to the Supreme Court of the United States pursuant to the Act of Congress of 1851. *United States v. Peralta*, 60 U.S. 343, 15 L.Ed. 678 (1857).

Antonio Maria Peralta, appellant's alleged predecessor, urged that his claim extended to the "pro-fundo mar," but this argument was rejected by the Commission. Peralta appealed to the United States District Court which affirmed the Commissioners. Thereafter, on June 5, 1874, Antonio Maria Peralta was granted a United States Patent describing the boundary of his property fronting on San Francisco

Bay as being the line of ordinary high tide. Said line of ordinary high tide was further described in said patent by courses and distances.

It is well settled that such a United States land patent is a final judgment and an adjudication of all the alleged rights of Peralta. *De Guzer v. Banning*, 91 Cal. 400 (1891), Affirmed 167 U.S. 723 (1897). The Peralta patent is not now subject to any modification, alteration or amendment, but is an adjudication of the boundaries and the extent of his property. *Fossat v. United States*, 69 U.S. 649, 17 L.Ed. 739 (1864); *Higuera v. United States*, 72 U.S. 827, 18 L.Ed. 469 (1865).

Any claims based upon the original Spanish Land Grant, or upon the Treaty of Guadalupe-Hidalgo, or the Act of Congress of 1851 were adjudicated by the commissioners, affirmed by the District Court, and settled by the Patent to Antonio Maria Peralta. Appellant cannot now collaterally attack that patent and claim a greater extent for her alleged predecessor. If appellant is a successor of Peralta, she is bound by the patent granted Peralta, and that patent conveyed no interest in the tidelands, but by its terms stopped at the line of ordinary high tide.

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(B) Reclaimed Tidelands

The lands involved in this litigation are reclaimed tidelands of San Francisco Bay lying in the southern part of the City of Alameda, California. Appellant believes that the reclamation of the tidelands established a new line of ordinary high tide, and that her

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alleged boundary shifts because of the change of such line of ordinary high tide.

Assuming for the sake of argument that appellant is an abutting upland owner, the law is well settled that an abutting land owner is entitled to all natural accretions to his land, but that he acquires no right, title or interest to any tidelands artificially filled. *City of Newport Beach v. Fager*, 39 CA 2d 23 (1940); *Los Angeles Athletic Club v. Santa Monica*, 63 CA 2d 795 (1944); *People v. Heches*, 179 CA 2d 823 (1960); *Patton v. Los Angeles*, 169 Cal. 521 (1915); *Petersen v. United States*, 327 F. 2d 219 (1964); and *South Shore Land Company v. Petersen*, 230 CA 2d 628 (1964).

The lands involved in this action were created by artificial filling operations conducted by one of the appellee's predecessor in interest, and are seaward or below the line of ordinary high tide described in the Peralta Patent. Appellant as an alleged successor in interest to Peralta, acquired no interest in any lands seaward or below the line of ordinary high tide. Twice, this very question has previously been adjudicated contrary to appellant's assertions. *South Shore Land Company v. Petersen*, (*supra*). *Petersen v. United States*, (*supra*).

It is clear from the foregoing that there are no facts alleged in appellant's amended complaint which would state a claim upon which relief could be granted, since under no theory would she be entitled to quiet title to the real property described in her amended complaint.

II. LACK OF JURISDICTION

It is also submitted that the Federal District Court lacked jurisdiction of the subject matter of this claim, and that its order dismissing said amended complaint should be affirmed. Appellant bases her claim to the Federal District Court's jurisdiction on three sections of Title 28, United States Code:

Section 1331—Federal Questions

Section 1338—Patents, Copyrights and Trade-marks

Section 1354—Conflicting Legislative Grants

Appellant in her amended complaint further asserted jurisdiction based upon diversity of citizenship, but appears to have waived this ground on appeal.

(a) 1331—Federal Question

Federal courts have long been strict in matters involving the so-called "federal question" jurisdiction under Title 28 U.S.C. 1331, and they require that a substantial issue under the United States Constitution, treaties or laws be presented before jurisdiction will attach. Essentially, the federal issue must be a substantial part of the plaintiff's claim, and it must clearly appear from well-pleaded allegations of the complaint that such federal question appears. *Gully v. First National Bank*, 299 U.S. 109, 81 L.Ed. 70 (1936).

There have been numerous cases in which plaintiffs have claimed federal jurisdiction alleging that their rights derived from Spanish or French land grants, and that their rights were protected by United States

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Treaty, Congressional acts pursuant to such treaties, and confirmed United States Land Patents. In these cases, it has been uniformly and consistently held that a federal question has not been raised. *Muse v. Arlington*, 168 U.S. 430, 42 L.Ed. 531 (1897); *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U.S. 169, 44 L.Ed. 720 (1900); *Joy v. St. Louis*, 201 U.S. 332, 50 L.Ed. 776 (1905); *Devine v. Los Angeles*, 202 U.S. 313, 50 L.Ed. 1046 (1906); *Huckins v. Duval County, Florida*, 286 F. 2d 46 (1960).

It has been held that it must appear on the face of the complaint that a right, privilege or immunity dependent upon the United States Constitution, United States Treaty or law will be established or defeated by proper construction of the Constitution, Treaty or law. A naked allegation that an action arises out of or derives from the Constitution, a Treaty or federal law is insufficient. *Little York Gold Washing & Water Co. v. Keyes*, 96 U.S. 199, 24 L.Ed. 656 (1877); *Shreveport v. Cole*, 129 U.S. 36, 32 L.Ed. 589 (1889); *Filhiol v. Maurice*, 185 U.S. 108, 46 L.Ed. 829 (1901); *Gardner v. Schaffer*, 120 F. 2d 840 (1941).

Further, the United States Constitution does not confer any jurisdiction on the District courts. Article III, section 1, reads:

“The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

Thus, Congress establishes jurisdiction of the District courts, and it is not required to give the full measure

of jurisdiction possible under the broad language of Article III, section 2. *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922); *Sheldon v. Sill*, 49 U.S. 441 (1850).

It is submitted that appellant has entirely failed to raise a substantial federal issue in her amended complaint, and further, that she cannot amend her complaint to do so.

(b) 1338—Patents, Copyrights and Trademarks

Appellant urges upon this appeal that the jurisdiction of the Federal District Court is founded upon the Patent, Copyright and Trademark jurisdiction of that court. This novel notion apparently involves the appellant's alleged United States Land Patent. This argument deserves no comment except that it has been consistently held under the authority cited above that claims arising under United States Land Patents are not cognizable in the federal courts.

(c) 1354—Conflicting Legislative Grants

Section 1354 states:

“The district courts have original jurisdiction of actions between citizens of the same state claiming lands under grants from different states.”

Appellant has alleged no facts which would show that two states have made conflicting grants to the same land. In fact, appellant relies solely on a United States Land Patent, which is not a grant from a State, but is a grant from the United States. It is clear that this action does not involve grants from two states.

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In view of the foregoing, it is respectfully submitted that the judgment in favor of appellees should be affirmed.

Dated, May 25, 1967.

BURNHILL, RODE, MOFFITT & MOORE,
RALPH N. MENDELSON,
JOHN L. LENSSEN,

THOMAS C. LYNCH,
Attorney General, State of California,
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FREDERICK M. CUNNINGHAM,
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HAGAR, CROSBY & ROSSON,
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LANDELS, RIPLEY, GREGORY & DIAMOND,
EARL M. RIPLEY,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN L. LENSSEN,
Attorney for Appellees.

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In view of the foregoing, it is respectfully submitted that the judgment in favor of appellees should be affirmed.

Dated, May 25, 1967.

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EARL M. RIPLEY,
Attorneys for Appellees.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN L. LENSSEN,
Attorney for Appellees.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK ARTHUR ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

AUG 9 1967

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FOR THE NINTH CIRCUIT

PATRICK ARTHUR ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK ARTHUR ROBERTS,
Appellant,

vs.

UNITED STATES OF AMERICA.
Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On December 8, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in one count against appellant Patrick Arthur Roberts and a codefendant, David Joseph Dimeglio. The indictment read as follows:

"On or about November 24, 1965, the defendants DAVID JOSEPH DIMEGLIO and PATRICK ARTHUR ROBERTS transported a stolen 1966 Ford automobile, a motor vehicle, in interstate commerce to the State of Arizona

from Los Angeles County, California, in the Central Division of the Southern District of California, knowing said vehicle to have been stolen. "

On January 10, 1966, defendant Dimeglio pleaded guilty to the offense charged and was sentenced to thirty months' confinement. Appellant pleaded not guilty to the offense charged on December 20, 1965, and his trial was set for January 24, 1966, later continued to January 31, 1966.

On January 31, 1966 a jury was impanelled to try appellant. On February 1, 1966, appellant waived further trial by jury, and a trial by the court was had on that day and on the following day, February 2, 1966, when appellant was found guilty of the offense charged by the court.

On March 21, 1966, appellant was sentenced to the custody of the Attorney General for a term of four years, to run concurrently with the State of California sentence which appellant was then serving. This Federal sentence was imposed pursuant to Title 18, United States Code, Section 2312.

Jurisdiction of the District Court was based on Title 18, United States Code, Section 2312, and on Title 18, United States Code, Section 3231.

Jurisdiction of this court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 18, United States Code, Section 2312, reads as follows:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

1. Was there sufficient evidence at the trial below that appellant knew the vehicle was stolen and, knowing it was stolen, transported it in interstate commerce from California to Arizona?
2. Did the trial court abuse its discretion in permitting the Government to reopen its case-in-chief in order to receive the testimony of David Joseph Dimeglio?

IV

STATEMENT OF FACTS

On November 23, 1965, one Henry Mazarella was the owner of a 1966 white-on-blue Ford LTD hardtop, bearing temporary California license Number 0135849 and vehicle identification number 6J67Y101702. On November 23, 1965, Mazarella drove his car to his place of business at 7175 Willoughby Street in Los Angeles, where he parked the car in the adjoining parking lot at about 6:30 A. M. , leaving the keys in the ignition. At about 9:30 A. M. , on the same date Mazarella returned to the parking lot and discovered that his car was missing [R. T. 71].^{1/}

Mazarella had not given anyone permission to drive his car on November 23, 1965. Nor was he acquainted with appellant or with David Joseph Dimeglio [R. T. 72]. Mazarella reported his car as stolen to the Los Angeles Police Department on the same day [R. T. 73].

At about 3:35 A. M. , on November 24, 1965, two men drove into a Chevron Service Station at 449 East Hopson Way, Blythe, California. They were driving a 1966 Ford white-over-blue LTD automobile [R. T. 80]. The men ordered a full tank of gasoline. These men proceeded, at gunpoint, to order the service station attendant, Jim Gregory, to go to the station's restroom and remove his clothing, which he did [R. T. 85]. Through the

^{1/} "R. T. " refers to Reporter's Transcript.

open door of the restroom, Gregory saw the Ford heading north on the highway where the station was situated. Gregory then called the Blythe Police Department and reported what had happened [R. T. 88]. Prior to being held up by the men, Gregory had put 13-1/2 gallons of gas into the Ford [R. T. 89], which was not paid for.

At approximately 4:00 A. M. , on November 24, 1965, Officer Glenn Richard Mackey of the Blythe Police Department was advised that an armed robbery had occurred at the Standard Station located in the 400 block of West Hopson Way in Blythe. Officer Mackey was further advised that the suspect vehicle, containing two armed white males, was proceeding along the main highway toward the Arizona border. The vehicle was described as a white-over-blue 1966 Ford LTD [R. T. 126]. Officer Mackey gave chase to the vehicle.

On Highway 60, about ten miles east of the Arizona border in Arizona, Officer Mackey spotted the described vehicle and, after a chase at speeds up to 100 miles per hour, succeeded in pulling over the vehicle [R. T. 128-129]. The two persons in the car turned out to be defendant and his codefendant, David Joseph Dimeglio [R. T. 130]. Dimeglio was the driver and appellant a passenger. These defendants were then arrested by Officer Mackey and advised of their constitutional rights. During a search of the car incident to the arrest two pistols were found, one under the driver's seat and another under the passenger's seat which had been occupied by appellant. Both guns were loaded [R. T. 131].

The license plates which were on the vehicle, California number GAN 474, had been stolen from a Mrs. Helen Finn [R. T. 144]. Also found during the search was a large cardboard box containing clothing which appellant identified as belonging to him [R. T. 133].

Appellant and Dimeglio had left Los Angeles in the stolen Ford at about 10:00 P. M. , on November 23, 1965, planning to go to Georgia in the car. Dimeglio drove the first few miles, then appellant took over the driving until they reached Indio [R. T. 281-282]. All of the foregoing facts were brought out in the Government's case-in-chief.

At the trial, appellant took the stand and testified on his own behalf, to the following effect: That on November 21, 1965, he was released from the Los Angeles County Jail; that he then met codefendant Dimeglio, whom he had known previously, at a rooming house in Los Angeles; that Dimeglio on November 22, 1965, was not driving a car; that on the morning of November 23, 1965, he joined Dimeglio on a bus ride and walked with him around the streets of Hollywood; as they walked, Dimeglio told him to walk to the "end of the street," which he did; that Dimeglio then drove up to the corner of the street where he was waiting, driving a new 1966 Ford; that he did not ask Dimeglio where the car had come from; that after using the car on that day for a number of errands he and Dimeglio left Los Angeles on the night of November 23, 1965, for Georgia; that he drove to Indio from Los Angeles, and later Dimeglio drove to Blythe, where they stopped at the service station; and that they were apprehended on the highway in



V

ARGUMENT

- A. THERE WAS SUFFICIENT EVIDENCE BEFORE THE TRIAL COURT TO UPHOLD THE COURT'S FINDING THAT APPELLANT KNEW THE VEHICLE WAS STOLEN AND, KNOWING IT WAS STOLEN, TRANSPORTED IT IN INTERSTATE COMMERCE FROM CALIFORNIA TO ARIZONA.
-

Appellant contends that there was insufficient evidence of his knowing transportation of the stolen vehicle from California to Arizona, and that the trial court erred in refusing his motion for judgment of acquittal, made pursuant to Rule 28 of the Federal Rules of Criminal Procedure.

When the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U.S. 60 (1942);

Noto v. United States, 367 U.S. 290 (1961);

Stein v. United States, 327 F. 2d 825 (9 Cir. 1964),
cert.denied 377 U.S. 970.

The evidence before the trial court showed that appellant was in the company of codefendant Dimeglio on November 23, 1965, at which time Dimeglio, who had previously been without a car,

suddenly turned up driving a 1966 brand new Ford [R. T. 173]. On the same night, appellant and Dimeglio left in the car for Georgia, and appellant drove the automobile from Los Angeles to Indio [R. T. 178, 281-282]. Before leaving Los Angeles, appellant bought about \$5.00 worth of gas for the Ford at a Standard Station in Los Angeles [R. T. 218-219], and he also sold a tire which he found in the trunk of the stolen vehicle, at Dimeglio's request [R. T. 245-247]. Then, at the time Dimeglio and appellant were arrested in Arizona, appellant's clothing was found in the car [R. T. 133].

The elements which the Government was required to prove beyond a reasonable doubt at the trial below, in order to obtain and sustain appellant's conviction, were:

FIRST: The act or acts of transporting, or causing to be transported, in interstate commerce, a stolen motor vehicle; and

SECOND: Doing such act or acts willfully, and with knowledge that the motor vehicle had been stolen.

Sadler v. United States, 303 F. 2d 664 (10 Cir. 1962);

Gerber v. United States, 287 F. 2d 523 (10 Cir. 1961);

Ackerson v. United States, 185 F. 2d 485 (8 Cir. 1950);

Barfield v. United States, 229 F. 2d 936 (5 Cir. 1956).

Appellant in his brief does not appear seriously to question that the first necessary element was proved at trial. That the 1966 Ford in question was the same vehicle which had been stolen from

Mazarella, and that appellant drove it from Los Angeles to Indio, as well as that he sold a tire from the car and bought gas for it, were undisputed at the trial. It is well established that the act of transporting which must be shown does not have to be an actual, physical driving across the state line by the accused. It is sufficient for the Government to show any act of driving, whether within the state of origin or otherwise, which comprises a substantial step in furtherance of an intended interstate journey.

Barfield v. United States, 229 F.2d 936 (5 Cir. 1956).

Such an act of driving was clearly shown in this case, in the testimony both of appellant and of Dimeglio.

We are left with the question whether appellant knew that the vehicle was stolen at the time he transported it.

It should be noted in connection with this question of guilty knowledge that appellant himself testified on direct examination, though not of course as a part of the Government case, that he had been walking around Hollywood with Dimeglio when Dimeglio told him to walk to the corner and wait for him, and that Dimeglio rejoined him with the stolen car within a few minutes. The trial court commented as follows: [R. T. 309-310]

" . . . Mr. Roberts on the stand -- his testimony about how Dimeglio disappeared for five minutes and came back with what the evidence shows was a brand new car, had paper licenses on it, Roberts just stands up here and tells me that he didn't know anything about this car being stolen or that

he thought it belonged to Dimeglio, don't draw that inference.

"They were a long ways from Dimeglio's home and Dimeglio had not had a car and all of a sudden he shows up with a brand new car. Even if he had the money he couldn't have bought it in that length of time.

"There is no testimony they were in a garage or Dimeglio went to a garage, Ford garage to buy a new car. He hadn't had it before.

"I conclude that the evidence does establish beyond a reasonable doubt that the defendant is guilty as charged and I so find."

The foregoing establishes that the trial court was not satisfied with appellant's account of how he came to be in possession of the car (if he was in possession), and that in the court's opinion the circumstances of Dimeglio's coming into possession of the car placed his companion, appellant, on notice that it was stolen.

Knowledge of an accused that an automobile in his possession was stolen can be established by circumstantial evidence. Keyes v. United States, 314 F.2d 119 (9 Cir. 1963). Such circumstantial evidence is found here in the appellant's sale of the stolen tire and buying of gas for the car, as well as in the holdup of the service station and theft of gas therefrom.

We are led to the question whether appellant had possession of the vehicle during the interstate journey, such that he may be inferred to have had knowledge that the vehicle was stolen.

In the case of United States v. Bennett, 356 F. 2d 500 (7 Cir. 1966), cert. denied 384 U.S. 975, the court held that the recent unexplained joint possession of a stolen motor vehicle by defendants who were found in the vehicle permitted an inference that they had stolen it and constituted sufficient evidence to support the jury's finding of guilty. This inference is a familiar one in Dyer Act cases.

See, United States v. Kolakowski, 314 F. 2d 699

(3 Cir. 1963);

Allison v. United States, 348 F. 2d 152, 153

(10 Cir. 1965);

Smith v. United States, 360 F. 2d 590 (5 Cir. 1960);

Luciano v. United States, 343 F. 2d 172 (4 Cir. 1965).

"Possession," in this context, means actual control, dominion or authority over the motor vehicle.

Allison v. United States, *supra*.

If the court below properly found that appellant, jointly with Dimeglio, had such possession, then it properly inferred therefrom the guilty knowledge of appellant. The Government submits that on the facts of this case appellant did control the vehicle to a sufficient degree. When appellant drove the car (a fact brought out by Dimeglio's testimony), bought gas for it, and sold the spare tire, he was clearly exercising dominion and control over it: the

court so found, and its finding should not be disturbed on appeal. Moreover, appellant's involvement in the robbery of the Standard Station in Blythe, the purpose of which was clearly to obtain gas and funds for the trip to Georgia, goes far to show appellant's willing taking of responsibility for the successful outcome of the trip in the stolen Ford.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO REOPEN ITS CASE-IN-CHIEF IN ORDER TO RECEIVE THE TESTIMONY OF DAVID JOSEPH DIMEGLIO.

The testimony of David Joseph Dimeglio, including his testimony that appellant drove the stolen vehicle from Los Angeles to Indio, California, was given pursuant to the trial court's permission for the Government to reopen its case after it had rested [R. T. 272]. Appellant assigns this permission to reopen as error, although in appellant's brief it is recognized that the reopening of a case lies in the discretion of the court [Appellant's Brief, p. 27].

The Government agrees that permission to reopen the Government's case may be given in the discretion of the trial court. We submit further that the reopening of the Government's case below involved a clearly proper exercise of that discretion.

It is well established that "whether a case may be reopened for further evidence rests in the sound discretion of the trial court and it will not be interfered with unless clearly abused."

United States v. Sheba Bracelets, Inc. ,

248 F.2d 134, 144 (2 Cir. 1957).

This principle has been many times reaffirmed. See, for example, Powell v. United States, 307 F.2d 396 (D.C. Cir. , 1962), cert. denied 377 U.S. 972.

Wolcher v. United States, 218 F.2d 505 (9 Cir. 1955),
cert. denied 350 U.S. 822;

Lucas v. United States, 343 F.2d 1 (8 Cir. 1965);
United States v. Zeid, 281 F.2d 825 (3 Cir. 1960).

Appellant does not here contend that he was surprised by the testimony of Dimeglio which was let in. Rather, appellant appears to argue that the Government should have been required to produce Dimeglio as a witness, if at all, prior to appellant's taking the stand. The case law does not support this contention. An instructive opinion in this regard is that of the Tenth Circuit Court of Appeals in Massey v. United States, 358 F.2d 782 (10 Cir. 1966). Massey, like the case at bar, was an appeal from a conviction of Dyer Act violation. At trial, the court twice permitted the Government to reopen its case in order to put in sufficient evidence of the identity of the car which had been stolen and transported. There, as here, the appellant complained that the trial court had pointed out to the Government prosecutor the weaknesses of his case and in effect suggested that they be remedied. In affirming the conviction, the Court of Appeals stated:

"The appellant contends that the trial judge participated too actively in the conduct of the trial,

especially in suggesting necessary proof to the prosecuting attorney . . . In this case, the trial judge suggested that a Pontiac dealer should be able to shed more light on the subject of identification, and the government, heeding the suggestions, produced a factory representative of the manufacturer as a rebuttal witness . . . The activity of the trial judge was not that of an advocate, but clearly was designed to get all the available facts fully and fairly before the jury.

In so acting, he did not abuse its discretion. "

The court in Massey also observed that testimony given after the reopening of the Government's case did not surprise the defendant or make necessary any further preparation. The same is the case here, although appellant states in his brief (at page 28), that "To the extent that the government held back the witness Dimeglio's testimony, the defendant was deprived of a true election as to how to proceed. " But the fact is that appellant, following the close of the Government's case-in-chief during which Dimeglio did not testify, nevertheless took the stand and testified that he had driven the 1966 Ford from Los Angeles to Indio. This is the same testimony which Dimeglio later gave during the Government's reopened case, and it can hardly have come as a surprise to appellant at the later time. Appellant's defense was not prejudiced by this testimony except as it tended to show his possession of the stolen vehicle. Moreover, if appellant had been truly surprised by

Dimeglio's testimony, his counsel would undoubtedly have moved for a continuance: this he failed to do.

A Ninth Circuit case in accord with Massey is Haugen v. United States, 153 F. 2d 850 (9 Cir. 1946). There, in a prosecution for forging and uttering counterfeit obligations of the United States, a trial was had to the court. Thereafter the court, without making a finding of guilty or not guilty, filed an opinion wherein it observed that the Government had failed to establish that the obligations involved were obligations of the United States. The obligations were counterfeited meal tickets issued by a commissary and the Government had not proved that the commissary was an agency of the United States or that the counterfeiting of the tickets was calculated to defraud the United States. After the filing of this opinion, the Government was permitted to reopen its case in order to present evidence on these elements of the offense. The Court of Appeals found that the trial court had acted properly and within its discretion in permitting the Government to reopen its case. Just so, here, the trial court properly permitted the reopening of the Government's case in order to receive the testimony of Dimeglio relating to appellant's transportation of the stolen 1966 Ford.

Accord, Medina v. United States, 254 F. 2d 228 (9 Cir. 1958).

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer

MICHAEL HEUER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL,
SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21456

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL,
SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

OPINION BELOW

The district court did not write an opinion. Its findings of fact, conclusions of law, and judgment are set forth at pages 76-81 of the reproduced record.

JURISDICTION

This suit in form seeks injunctive and declaratory relief and specific performance against the United States and the Secretary of the Interior. The jurisdiction of the district court was asserted to be founded on 28 U.S.C. sec. 1353; Section

4 of the General Allotment Act of 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 334; the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U.S.C. sec. 345; and the Act of February 6, 1901, 31 Stat. 760, as amended, 25 U.S.C. sec. 346 (R. 42-43). We believe the jurisdiction of the district court over the Secretary of the Interior, and the venue, in an action of this type may be founded on 28 U.S.C. secs. 1361 and 1391(e). The district court dismissed the complaint by judgment filed July 25, 1966 (R. 81). Notice of appeal was filed on September 23, 1966 (R. 84). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior's rejection of appellants' applications for Indian allotments was a reasonable exercise of the discretionary power vested in him by the Taylor Grazing Act and the General Allotment Act and was not subject to judicial revision.

1/ Cf. Coleman v. United States, 363 F.2d 190 (C.A. 9, 1966), reh. den., June 20, 1967; Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964); Lewis v. Udall, 374 F.2d 180 (C.A. 9, 1967); Dredge Corp. v. Penny, 338 F.2d 456 (C.A. 9, 1964).

2. Whether dismissal was proper as to those appellants who did not exhaust their administrative remedies.

STATUTES INVOLVED

Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1269, 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. sec. 315f, reads as follows:

Sec. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: Provided, That locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. Where such lands are located within

grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

Section 7 had originally read as follows:

Sec. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: Provided, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

Section 4 of the General Allotment Act of 1887, 24
Stat. 388, 389, as amended, 25 U.S.C. sec. 334, provides:

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331-334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

STATEMENT

This action was instituted by appellants in April 1965
to obtain injunctive and declaratory relief and specific performance against the United States and the Secretary of the Interior

in connection with applications for Indian allotments of public lands located in the State of California (R. 2). The basic facts are undisputed and may be summarized as follows:

The 33 appellants are persons of Indian blood. Each applied to the local Land Office, Bureau of Land Management, Department of the Interior, for an Indian allotment of 160 acres of public lands pursuant to Section 4 of the General Allotment Act of 1887, supra, p. 5. Each application was accompanied by a certificate of eligibility for an allotment, which had been issued by the Bureau of Indian Affairs. The public lands applied for had been withdrawn from settlement and reserved for classification by Executive Order No. 6910 (November 26, 1934) 54 I.D. 539. For that reason, each appellant petitioned for classification and opening of the public lands to entry. 43 C.F.R. (1966 rev.) secs. 2211.0-7 and 2212.1.

After field examination and analysis of the properties described, the local Land Offices rejected the petitions and applications. The rejections were uniformly founded on a finding that the lands described are not proper for title transfer under the General Allotment Act because the lands would not support an Indian family. The bases for that finding were facts showing that the lands described are unsuited for Indian allotment

by reason of location, topography, vegetation, land tenure pattern, and general economy of the area. Seven applications (R-06410 through R-06416) were rejected also because the public lands involved had been ordered into the market for sale at public auction under the Isolated Tracts Act, R.S. sec. 2455, as amended, 43 U.S.C. sec. 1171, and 43 C.F.R. subpart 2243, prior to the time the applications were filed.^{2/} Twenty-six of the 33 appellants appealed the local Land Offices' rejections, which ultimately became the Secretary's final orders.

Appellants then filed this suit on behalf of themselves and other Indians in an attempt to make the suit a class action (R. 5). Basically, the object of the action was to enjoin the United States and the Secretary from reclassifying public domain lands and to require allotment of the described lands to appellants (R. 5-7). After hearing, the district court in a memorandum opinion denied appellees' motion to dismiss appellants' complaint and declared that the action was not a proper class action (R. 8-14, 37-41).

^{2/} Appellants are mistaken in representing that the public lands involved in the other 26 applications were ordered into the market for sale at public auction (Br. 5-6).

In their second amended complaint, filed in March 1966, appellants sought the same type of relief as in the earlier complaints but deleted the class action aspect (R. 42-47). The district court granted appellees' motion for summary judgment--finding and concluding, after review of the administrative record as to each of the 33 claims, that the district court had no jurisdiction to overturn the Secretary's denial of the claims because Congress had conferred upon the Secretary "discretion to examine and classify lands in the public domain for disposal." The district court also concluded that the administrative record showed that the denial of 26 of the 33 claims was not arbitrary, capricious, or in bad faith; and that, as to the remaining seven claims, appellants failed to exhaust their administrative remedies by not protesting and appealing the local Land Offices' decisions to the Bureau of Land Management and to the Secretary as required by 43 C.F.R. (1966 rev.) secs. 1844.1 and 2411.1-1. (R. 48, 76-78, 81.) This appeal followed.

SUMMARY OF ARGUMENT

This appeal involves 33 claims by Indians for allotment of public lands. It is the first in a series of similar cases to be presented to a federal appellate court. Numerous such cases have been recently pressed in the Department of the

terior and in the federal district courts. We believe the district court was correct in dismissing the complaint for the following reasons.

A. The public lands for which appellants applied had been withdrawn from entry and disposition of any kind by executive order ratified by Congress in amending Section 7 of the Taylor Grazing Act. Thereafter, pursuant to statute and authorized regulations, the Secretary of the Interior examined the public lands involved and concluded that they were unsuited for Indian settlement and allotment because the lands were unfit for agricultural development. Since Congress vested discretion in the Secretary to so do, his rejection of appellants' applications for that reason was not subject to judicial review and revision. Berry v. Udall, 336 F.2d 706, 711-714 (C.A. 9, 1964), cert. den., 361 U.S. 904.

B. There is neither statutory basis, case authority, nor administrative construction to support appellants' assertion that the General Allotment Act conferred on them a right to allotment of any public lands they select and describe. Indeed, the relevant statutes, the cases, and the administrative construction are to the contrary. Appellants have not "settled"

upon these particular public lands which were "otherwise appropriated" and unavailable for disposition of any kind until favorable classification by the Secretary "in his discretion." "Element of allotment legislation does not of itself rest any right to allotments." Wise v. United States, 297 F.2d 822, 827 (Ct. 10, 1961), cert. den., 369 U.S. 876.

C. The Secretary's decision, that the public lands selected should not be classified for settlement and are unsuited for Indian allotment, is reasonable. The purpose of the allotment system was to provide Indians with a homestead which would support them from agricultural pursuits. The public lands here were found to be unsuited for such purpose. That finding is supported by substantial evidence in the administrative record, and is confirmed by the district court. Disposition by summary judgment was of course proper.

D. Those appellants, who did not seek administrative review of the local Land Office denials of their applications for classification and allotment, could not qualify for judicial relief because they failed to exhaust their administrative remedies.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT

This appeal presents 33 claims for Indian allotment of public lands. Although the number is not extraordinary in itself, we wish to advise the Court for its information that numerous claims--identical to those in the case at bar as to nature, relief sought, and arguments and authorities in support of and against the claims--have been and are being pressed in the federal district courts within this Circuit as well as within the Tenth Circuit, and also before the Department of the Interior.^{3/} All such claims have been uniformly rejected where decision has been reached. These claims are the first to be presented to a federal appellate court. Finch v. United States, 263 F.Supp. 309 (W.D. Okla. 1967), appeal pending, will follow in the Tenth Circuit (No. 9474). Of the decided cases, only

^{3/} For example, Hopkins (Dukes) v. Udall, Civ. No. 64-1648-TC, S.D. Cal.; Carney v. Udall, Civ. No. 65-219-TC, S.D. Cal.; Oliphant (Wermey) v. McClain, Civ. No. 65-246-TC, S.D. Cal.; Carmelo v. Johnson, Civ. No. 65-283-TC, S.D. Cal.; Smith v. Udall and United States, Civ. No. 65-318-TC, S.D. Cal.; McCloud v. United States, Civ. No. 1811, D. Nev., pending; Hopkins (Dukes) v. United States, Civ. No. 66-292, D. Ore.; Finch v. United States, Civ. No. 66-278, W.D. Okla., C.A. 10, No. 9474, appeal pending; Daniels v. United States, 247 F.Supp. 193 (W.D. Okla. 1965); John E. Balmer, 7 I.D. 66 (1964) (Ariz.); Hopkins (Dukes), Colorado 0112669, Dept. of the Interior, December 20, 1963, unreported. Most of these cases represent a novel effort by an organization functioning under the name of the Tribal Indian Land Rights Association in most western States to obtain public lands for Indian members under the General Allotment Act.

two district courts have rendered reported opinions. Daniels v. United States, 247 F.Supp. 193 (W.D. Okla. 1965); Finch v. United States, supra. We rely on those opinions throughout this brief.

A. The Secretary of the Interior's decisions that the described public lands should not be classified as available for settlement and that the lands are unsuited for Indian allotment are not subject to judicial review and revision. - There can be no question of the plenary power of Congress to dispose of any kind of property held by the United States, to the extent that private rights have not vested. U.S. Const. IV, sec. 3, cl. 2; Alabama v. Texas, 347 U.S. 272, 273-274 (1954). "That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it * * *." Gibson v. Chouteau, 13 Wall. 92, 99 (1872). This power is delegable. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1962). R.S. sec. 453, as amended, 43 U.S.C. sec. 2, and R.S. sec. 24 as amended, 43 U.S.C. sec. 1201, delegated such power regarding public lands and authorized the Secretary to issue appropriate regulations relating thereto.

In Section 7 of the Taylor Grazing Act, supra, p. 3, Congress authorized the Secretary of the Interior, "in his discretion, to examine and classify any lands withdrawn or reserved" by Executive Order No. 6910, November 26, 1934, 54 I.D. 539, which embraces the lands involved here, and Congress specified: "such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." Congress further provided that upon application, the Secretary shall classify the tract, "and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided."

The grant of discretion is so clearly expressed that it is difficult to see how any question about its existence can arise. In amending Section 7 of the Taylor Grazing Act in 1936, Congress expressly acknowledged the withdrawal effected by Executive Order No. 6910 and thereby ratified it. Brooks v. Dewar, 33 U.S. 354, 360-361 (1941). Compare the original and amended terms of Section 7, supra, pp. 3-4.

That Congress was aware that it was granting discretion and intended a grant of discretion to the Secretary are

also plain from the legislative history. Hearings, H. Committee on Public Lands, H.R. 2835, 73d Cong., 1st sess. (1933), and H.R. 6462, 73d Cong., 2d sess. (1934) pp. 138-139; Hearings, S. Committee on Public Lands and Surveys, S. 2539, 74th Cong., 1st sess. (1935) p. 8. The enactment of the Taylor Grazing Act and the executive order withdrawals of 1934 and 1935 were the culmination of a long struggle by conservationists to reverse the long-standing federal policy on disposition of the public lands. By its ratification of the withdrawals of 1934 Congress reversed the situation where virtually all public lands not specifically withdrawn were available for the asking. John Kerr Rose, Survey of National Policies on Federal Land Ownership, S. Doc. No. 56, 85th Cong., 1st sess. (1957) pp. 16-41 (Cong. Doc. Ser. No. 11992). This accords with the Secretary's statement, quoted with approval in Carl v. Udall, 309 F.2d 653, 657-658 (C.A. D.C. 1962), that the "power to withhold from improper disposition and unwise uses is essential to the national policy of conservation of the rapidly diminishing public domain and its natural resources."

When appellants filed their applications, the Secretary examined the lands and classified them, but he classified

as unsuitable for Indian settlement and allotment. Thus, because of the failure of one of the conditions prescribed by Congress for the transfer of these particular lands from the public domain, appellants were not entitled to them.

Appellants seek to avoid this obvious conclusion by asserting that Section 4 of the General Allotment Act, supra, § 5, gives them an absolute right to select any public domain lands and that the Secretary's denial of their applications must therefore be arbitrary and capricious (Br. 6-16). These assertions are misconceived. As will be shown, that statute conveyed no right in particular tracts. Wise v. United States, 297 U.S. 822, 825-827 (C.A. 10, 1961), cert. den., 369 U.S. 876. These assertions also ignore completely the clear language of Section 7 of the Taylor Grazing Act, as amended, ratifying withdrawal of the lands from all forms of entry and lodging authority in the Secretary, in his discretion, to classify public lands for disposal or retention and preventing the acquisition of private rights in the land until after favorable classification. U.S. v. Udall, 309 F.2d 653, 657 (C.A. D.C. 1962); Daniels v. United States, 247 F.Supp. 193, 195-196 (W.D. Okla. 1965); Finch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal

pending. See also Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended, 25 U.S.C. sec. 336, which similarly provides that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *." The Secretary's reasonable construction of the applicable statutes and his regulations is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

Ferry v. Udall, 336 F.2d 706, 711-714 (C.A. 9, 1964), cert. den., 381 U.S. 904, considered the reviewability of the Secretary's decision where the decision is committed by Congress to the Secretary's discretion. This Court concluded that, regardless of whether review is sought in an action in the nature of mandamus or under the APA, "the Secretary's refusal to issue the certificates is not subject to judicial review" and "we are without power to review the Secretary's decision in this case," because the statute involved "commits the decision to sell to the Secretary's discretion." Moreover, the APA (now 5 U.S.C. (1964 ed.) Supp. II, sec. 701(a)) proscribes judicial review of "agency action * * * committed to agency discretion by law."^{4/} (336 F.2d at 711.)

^{4/} The principle of nonreviewability of discretionary authority vested by Congress in the Secretary was recognized in Panam Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-318 (1958), citing three cases involving former Secretaries of the Interior: Work v. River, 267 U.S. 175 (1925); United States v. Wilbur, 207 U.S. 414 (1902); and Wilbur v. United States, 281 U.S. 206 (1930).

The mandate of Congress is even more specific here. It follows that the disposition should be the same and that the Secretary's decisions should not be judicially revised. See also Lewis v. Udall, 374 F.2d 180, 182 (C.A. 9, 1967); Daniels v. United States, 247 F.Supp. 193, 195-196 (W.D. Okla. 1965); Winch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending.

B. The General Allotment Act did not confer on appellants a right of allotment to these particular lands. - In pertinent part Section 4 of the General Allotment Act of 1887, supra, p. 5, provides:

Where any Indian not residing upon a reservation * * * shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children * * *. * * *

Appellants here seem to argue that the General Allotment Act gives them an absolute right of allotment to the lands they have selected and for which they have applied. That argument is amiss.

The statute confers no right to specific lands. It does confer a right to an allotment but the Secretary has not

denied appellants such right. The administrative record in these cases shows that such right is recognized--but not as to these particular lands, for valid reasons to be discussed. As the Secretary said in John E. Balmer, 71 I.D. 66, 68 (1964), "An Indian applicant is not, of course, deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land that is suitable for acquisition under the Allotment Act."

Appellants appear to rewrite the statute so as to read that "when an Indian describes public land for allotment, the Secretary of the Interior is under legal obligation to grant an allotment of the public land described." The answer is that Congress did not legislate so broadly. In Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended, by Section 17 of the Act of June 25, 1910, 36 Stat. 860, 25 U.S.C. sec. 336, Congress supplemented the General Allotment Act in providing that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *. * * *" The Executive has here determined, pursuant to congressional direction, that these public lands are not suited for Indian allotment. As enunciated by this Court in Lewis v. General Services Administration (No. 20284, Apr. 24, 1964), not yet reported, "Allotments of land to Indians are made by the Secretary of the Interior."

Appellants do not satisfy other statutory requirements. In the General Allotment Act itself, Congress also required "settlement." Appellants have not settled upon the public lands involved. Further, Congress specified that the public lands selected be "not otherwise appropriated." These public lands were "not otherwise appropriated" by withdrawal from all entry until favorable classification by the Secretary, "in his discretion," pursuant to Section 7 of the Taylor Grazing Act, as shown above. In discussing the discretion vested in the Secretary by Section 7 of the Taylor Grazing Act, the court, in Carl v. Udall, 309 U.S. 653, 656 (C.A. D.C. 1962), stated that statutory rights of persons entitled to selection of public lands in lieu of lands formerly relinquished by their predecessors in title were "not rights to any particular tracts." Appellants' rights here are no more specific. There is therefore, we believe, no statutory basis for appellants' argument that their mere selection of public lands must be followed by allotment as a matter of right. 5/

In addition to lacking statutory basis, appellants' argument is contrary to the decided cases and the administrative construction. Citing Chase, Jr. v. United States, 256 U.S. 1, 17 (1921), the Tenth Circuit declared, in Wise v. United States,

See Lewis v. General Services Administration (C.A. 9, No. 20284, Apr. 24, 1967) not yet reported.

297 F.2d 822, 827 (1961), cert. den., 369 U.S. 876, "Enactment of allotment legislation does not of itself vest any rights to allotments." The court there considered the allotment procedure in a situation involving reservation lands, and commented comprehensively (at 825):

The legislative authority setting forth the procedure for allotments applicable here is the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C.A. § 331 et seq. The pertinent sections as hereinafter set out provide that certain administrative steps must be taken to effectuate a vested interest in an allottee. For example, "the whole subject of the distribution of the lands embraced in the reservation" rests "[with] the President, acting through the Interior Department." United States v. Fairbanks, 171 F. 337, 339, 96 C.C.A. 229, affirmed 223 U.S. 215, 32 S.Ct. 292, 56 L.Ed. 409. Thus under § 1 of the Act, the President is authorized to first cause a survey or resurvey of the Indian land "whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians" and "to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest * * *." Before any allotting may begin, there must be an administrative determination that the Indian land is suitable for agriculture or grazing, there must be a survey, and, after the survey, there must be a second administrative determination, i.e., that allotment is in the best interest of the Indians.

It ruled (at 827) that the particular allotment statute "contains no mandatory language, and it has been correctly construed by the Department of the Interior as granting where and when in the Secretary's discretion to make new allotments." That comment and ruling are applicable here.

While selection and application may segregate the land from other disposal, they do not confer a vested right to approval of the selection and application. When the Secretary actually approves an allotment, the ministerial duty arises to issue a patent. But approval itself is not a mere ministerial duty. Lemieux v. United States, 15 F.2d 518, 521-522 (C.A. 8, 1926), cert. den., 273 U.S. 749; Wise v. United States, 297 F.2d 822, 825, 827 (C.A. 10, 1961), cert. den., 369 U.S. 876. In the context of whether the right to an allotment survives death, it was stated in Woodbury v. United States, 170 Fed. 302, 305 (C.A. 8, 1909), "Until the allotment was made, Woodbury's right was personal--a mere float--giving him no right to any specific property. This statement was quoted with approval by the Supreme Court in LaRoque v. United States, 239 U.S. 62, 65 (1915). See also Daniels v. United States, 247 F.Supp. 193, 194-195 (W.D. Okla.

1965); Finch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending.

The administrative construction has also been that "the vesting of rights to lands does not take place upon the making of a selection or the issuance of a certificate of selection by an agent in the field" and that an allotment is not 'made' * * * until the issuance of such patents." Raymond Bear Hill, 52 L.D. 688, 691-692(1929). "The Secretary may for good reason refuse to approve an allotment selection, but he may not cancel his approval of an allotment except to correct error or to relieve fraud. Cf. Cornelius v. Kessel (128 U.S. 456) (public land entry)." Allotment Selections on the Fort Belknap Indian Reservation, 55 I.D. 295, 301-304 (1935). See John E. Balmer, 71 I.D. 66 (1964); Clark, Jr. v. Benally, 51 L.D. 98, 101 (1925); see generally Cohen, Handbook of Federal Indian Law (Dept. of the Interior 1942) pp. 107-108, for the scope of administrative power over Indian allotments.

It is clear, we submit, that the General Allotment Act did not vest in appellants a right of allotment to these particular public lands by appellants' mere selection and application.

C. The Secretary's decisions were reasonable. - When the purpose of the General Allotment Act and the nature of the public lands involved are considered, it is apparent that these public lands are improper for Indian allotment. The thrust of the Act, as shown by the language Congress used, was to place Indians in possession and ownership of agricultural (including grazing) lands which would sustain an Indian family engaged in pastoral pursuits. This was recognized by the Supreme Court in United States v. Payne, 264 U.S. 446, 448-449 (1924), affirming this Court's answer (284 Fed. 827 (1922)), to the "question * * whether the land, being timbered, is to be excluded from the operation of the Allotment Act which speaks only of agricultural and grazing lands." The answer was that "timbered lands, capable of being cleared and cultivated" (264 U.S. at 449; emphasis added) where so determined "in the opinion of the President" (284 Fed. at 829), are subject to Indian selection and allotment. "Before any allotting may begin, there must be an administrative determination that the Indian land is suitable for agriculture or grazing * * *." Wise v. United States, 297 F.2d 822, 825 (C.A. 10, 1961), cert. den., 369 U.S. 876.

The applicable regulations of course follow the congressional command. 43 C.F.R. (1966 rev.) sec. 2212.0-7.^{6/} See generally Cohen, Handbook of Federal Indian Law (Dept. of the Interior 1942) pp. 206-215. Where pastoral pursuits on the lands selected "cannot support an Indian family," denial of the application is required. Daniels v. United States, 247 F.Supp. 193, 195 (W.D. Okla. 1965). The Secretary thus stated, in John E. Balmer 71 I.D. 66, 67-68 (1964):

Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for

6/ Appellants may not validly rely (Br. 5, 16) on that portion of 43 C.F.R. (1966 rev.) sec. 2212.0-7(a) which reads:

(3) Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor cannot be denied on the ground that the lands are too poor in quality.
* * *

"This section by its own terms is only applicable to actual settlement on lands not reserved." Daniels v. United States, 247 F.Supp. 193, 194 (W.D. Okla. 1965) (emphasis by the court). As in Daniels and Finch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending, the Indian applicants here have not settled upon the lands involved and those lands have been reserved from entry. Clark, Jr. v. Benally, 51 L.D. 91, 93 (1925), the genesis of the regulation first expressed in Regulations, Indian Allotments on the Public Domain, 52 L.D. 383, 387 (1928), demonstrates the result where the applicant had been settled upon unreserved lands for several years and had made agricultural improvements and use.

an Indian family, as indicated by the language of the act which allows the different acreages of land suitable for different purposes, it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act.

Since Congress has so directed, it is irrelevant that the lands selected may be valuable for uses other than agricultural. Relief from that restriction must be sought from Congress--not from suit against the Secretary who is bound by congressional direction qualifying only agricultural lands for Indian allotment.

The public lands involved in this case were found, after extensive field examination, as revealed by the administrative record, to be improper for Indian allotment because unsuited for agricultural (including grazing) use. Typical of the bases for this finding was the field report in administrative record R-05510 ^{1/} that the lands are "entirely incapable of supporting any crop" and "would not support even a half dozen cattle" because "the lands are extremely rough, broken and boulder

^{1/} Land Report, Field Data, August 24, 1964, p. 3.

strewn. There is little or no vegetation. Soil is almost nonexistent * * *. The land surface in most places is solid granite * * *. Climate in the area is also extremely severe. Rainfall averages 3 inches annually * * *." ^{1/} The lands involved in administrative record R-05712, ^{2/} as another example, were found to be "capable of supporting less than one unit of livestock, or a total of about four units for all five applications. This number of livestock is not enough to develop a farm or ranch capable of supporting a family and providing a home. In fact, more than 100 units are required to provide an economic grazing unit. * * * the land is not suited for agricultural development. The land for which you have applied is located on

^{3/} Seven of the appellants' applications (R-06410 through R-06416) were also rejected because the lands involved had been ordered, prior to the filing of the applications, into the market for sale at public auction as "mountainous or too rough for cultivation" under the Isolated Tracts Act, R.S. sec. 2455 as amended, 43 U.S.C. sec. 1171. The orders segregated the lands from all appropriations and were therefore "otherwise appropriated" and not available for allotment under Section 4 of the General Allotment Act. Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904; Lewis v. Udall, 374 F.2d 180 (C.A. 9, 1967); 43 C.F.R. (1966 rev.) sec. 2243.1-6.

^{4/} Letter, Bureau of Land Management, February 19, 1965.

bedrock outcrop of impermeable basement rocks and irrigation wells cannot be developed. No similar lands in the area are being used for agriculture and the history of the area is one of failure in all attempts at agricultural development."

The administrative records as to each of appellants' applications were filed with the district court which expressly found (R. 77):

5. An examination of the administrative records shows that the defendants did not act arbitrarily, capriciously, or in bad faith in denying said applications.

The correctness of that finding is patent on this record and should be affirmed by this Court. Udall v. Tallman, 380 U.S. 1, 10/ 6-18 (1965).

Appellants' contention (Br. 9-21) that they are entitled to a trial on whether the Secretary's decisions were arbitrary without merit. Disposition by summary judgment was entirely proper. The reasonableness or arbitrariness of the Secretary's decision is a question of law, not of fact. Even if appellants' allegations were to be construed as raising a question of whether the Secretary's decisions were supported by substantial evidence, that too is a question of law, not fact. There is no question of unfairness or violations of procedural due process (Br. 11, 5). Of course, appellants were not entitled to a trial de novo. They were entitled to a hearing on the administrative record. This they were accorded. See Dredge Corp. v. Penny, 338 F.2d 456, 462-53 (C.A. 9, 1964); Carl v. Udall, 309 F.2d 653, 658 (C.A. D.C. 1964); Lewis v. Udall, 374 F.2d 180, 183 (C.A. 9, 1967); Ferry v. Udall, 374 F.2d 706, 714 (C.A. 9, 1964), cert. den., 381 U.S. 904; Noren v. Be, 374 F.Supp. 708, 709-710 (S.D. Cal. 1961); Daniels v. United States, 374 F.Supp. 193, 194-196 (W.D. Okla. 1965); Finch v. United States, 374 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending.

D. Certain of appellants failed to exhaust their administrative remedies. - The district court found that seven of the 33 applicants, who are appellants here, did not seek administrative review of the local Land Office denials of their applications for classification and allotment. ^{11/} For this reason the district court concluded that it could not afford these appellants the relief sought. (R. 55, 77.)

The finding is uncontested and the conclusion is sound. The administrative procedure and the statute involved require exhaustion of administrative remedies to finality. 43 C.F.R. (1966 rev.) secs. 1844.1 and 2411.1-1; 5 U.S.C. (1964 ed.) Supp. II, sec. 704. See Mulkern v. Hammitt, 326 F.2d 896, 898 (C.A. 9, 1964), and the discussion and cases cited in Davis v. Nelson, 329 F.2d 840, 846-847 (C.A. 9, 1964). As articulated in Myers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1938), it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

^{11/} The applications involved are R-06410 through R-06416 (R. 77).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully,

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JULY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 21456

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL,
SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE

FILED

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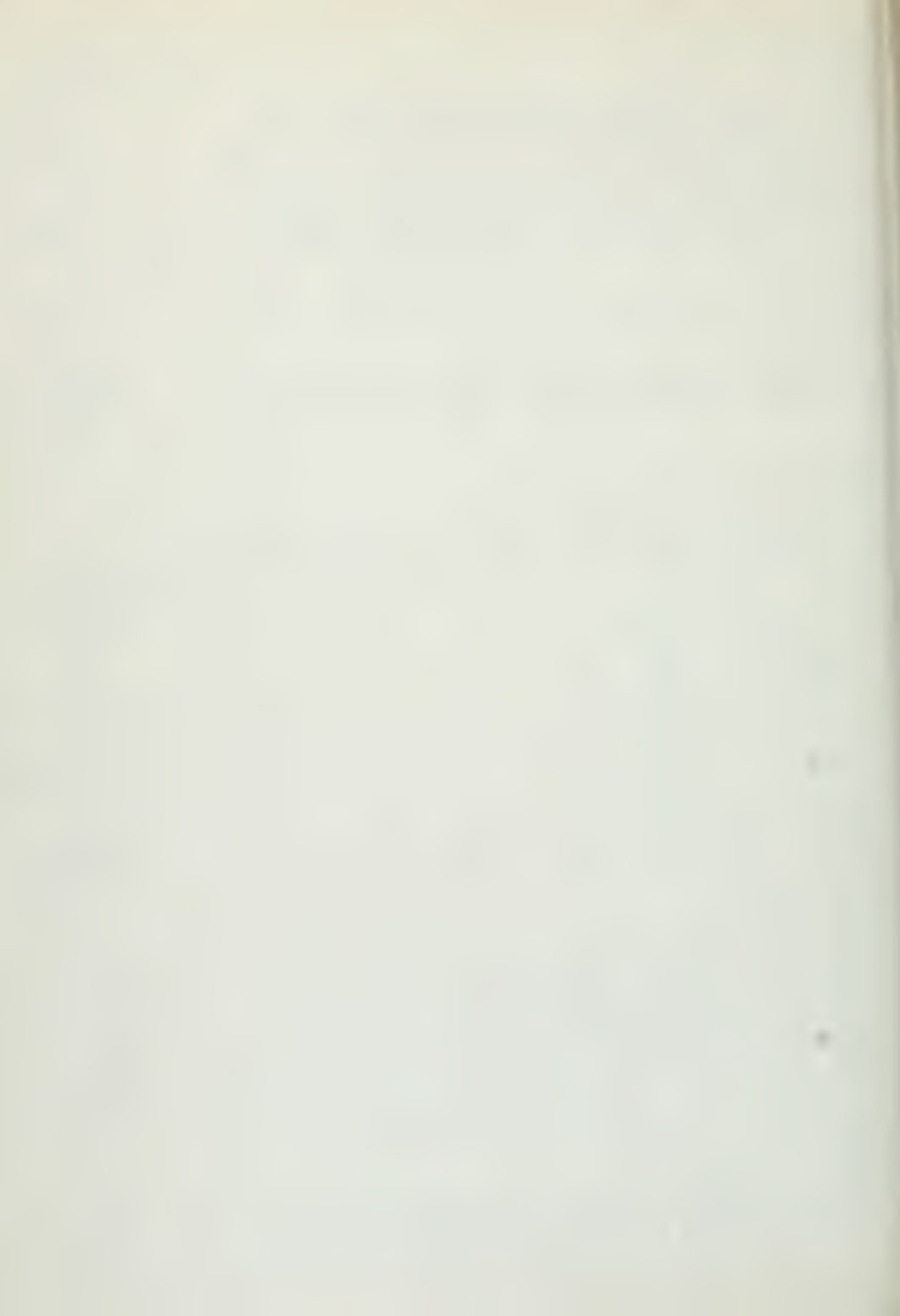
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IN THE UNITED STATES COURT OF APPEALS
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Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL,
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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

George F. Duke, Richard B. Collins, Jr., and
e J. Sclar are attorneys with California Indian Legal
ervices (formerly the Indian Services Division of Calif-
nia Rural Legal Assistance), a non-profit corporation
ndering free legal assistance to indigent California

Indians. The decision in this case will be of significance to many California Indians. Leave to file as amicus curiae was granted by an order of the court dated July 29, 1968.

ISSUES PRESENTED

1. Do 25 U.S.C. §345 and 28 U.S.C. §1353 give a federal district court jurisdiction over an Indian's suit to obtain an allotment?

2. Does the Taylor Grazing Act or withdrawals, reservations, and classifications made pursuant to that act limit an Indian's choice of an allotment under 25 U.S.C. §34?

3. Can the Interior Department rule that 160 acres of uncultivable land is unsuitable for an Indian allotment when the Department finds that an Indian family could not support itself by grazing livestock on the land but does not find that the Indian family could not support itself by other agricultural pursuits upon the land?

4. Is "unsuitable for an Indian allotment" a proper land classification under the Taylor Grazing Act?

5. Is land appropriated within the meaning of 25 U.S.C. §334 when it is listed for sale pursuant to the Isolated Tract Act (43 U.S.C. 1171)?

6. Are seven appellants who failed to pursue administrative appeals nevertheless entitled to judicial review of the Interior Department's decisions, when administrative appeals could have caused irreparable harm and an

terior Department regulation, whose legality the appellants challenge, would have rendered the appeals futile?

STATEMENT OF CASE

Appellants, 33 Indians, are appealing from summary judgments rendered by the United States District Court for the Central District of California (Jesse W. Curtis, Judge) in favor of appellees, United States of America and Stewart Udall as Secretary of the Interior, and denying the Indians' claims for allotments under 25 U.S.C. §334.

Each Indian initially filed an application for a 60 acre Indian allotment with the Riverside Land Office, Bureau of Land Management (BLM), Department of the Interior. The applications indicated on their face that they were made pursuant to Section 4 of the General Allotment Act of 1887, 25 U.S.C. §334. Accompanying each application was a certificate of eligibility for an allotment issued by the Bureau of Indian Affairs. Each application was also accompanied by a petition for classification, because the application form required a classification petition if, as in the case for every Indian, the application sought land withdrawn from settlement and reserved for classification by Executive Order No. 6910. (See Application for an Indian Allotment, question 10.)

The BLM rejected seven of the applications (R-06410 through R-6416) on the basis that the lands sought had been withdrawn into the market for sale at public auction under the

Isolated Tract Act, 43 U.S.C. §1171, very shortly before the applications were filed. Based on BLM field examinations, the other twenty-six applications were each rejected on the ground that the applicant could not support an Indian family by grazing livestock on the sought after parcel.¹ Some decisions also stated that the land was unsuited for raising crops. All twenty-six decisions "classified" the land as unsuitable for Indian allotments.

Unsuccessful administrative appeals were taken by the twenty-six Indians whose applications had been rejected on the ground of unsuitable land. In one case (R-05789) the Indian stated in his appeal that he would use the land to raise barnyard animals, but the BLM rejected that use as not proper for a 160 acre allotment. The other seven Indians did not pursue administrative appeals.

The thirty-three Indians then filed a suit to obtain allotments of the lands for which they had applied and to prevent the Government from taking any action that would make allotment impossible. Jurisdiction was asserted under 5 U.S.C. §345 and 28 U.S.C. §1353. In granting summary

The Government's opening brief states that applications R-06410 through R-06416 were also rejected because the parcels involved were unsuited for Indian allotments. (Pp. 6-7.) The administrative record available to us contains no field reports on those lands, and the trial court's findings of fact show the marketing orders under the Isolated Tract Act as the only basis for denying the applications (R. 77).

adgment against the Indians, the trial court held that it had no jurisdiction to review the Interior Department's decisions because the granting of allotments was committed to the Department's discretion. The court based its conclusion solely on the Administrative Procedure Act (5 U.S.C. 701-706 [formerly 5 U.S.C. §1009]) and made no reference to 5 U.S.C. §345 or 28 U.S.C. §1353. The court also concluded that it lacked jurisdiction to review the cases of the seven Indians who had not exhausted their administrative remedies. Finally, the court decided that the other twenty-six administrative decisions were not arbitrary, capricious, or made in bad faith. (R. 77-78.)

ARGUMENT

I. 25 U.S.C. §345 AND 28 U.S.C. §1353 GIVE A FEDERAL DISTRICT COURT JURISDICTION OVER AN INDIAN'S SUIT TO OBTAIN AN ALLOTMENT.

Both 25 U.S.C. §345 and 28 U.S.C. §1353 expressly provide for federal district court jurisdiction of an Indian's action to obtain an allotment, and the case law establishes that those statutes mean what they say. Arenas United States, 322 U.S. 419, 430-432, 88 L.Ed. 1363, 71-1372 (1944); Morrison v. Work, 266 U.S. 481, 490, 69 L.Ed. 394, 399 (1925); United States v. Payne, 264 U.S. 446, 7, 68 L.Ed. 782, 783 (1924); Prarie Band of Pottawatomie Tribe of Indians v. Puckee, 321 F.2d 767, 770 (10th Cir. 1963); United States v. Eastman, 118 F.2d 421, 423 (9th Cir. 1941); Leecy v. United States, 190 Fed. 289, 293 (8th Cir. 1911),

appeal dismissed 232 U.S. 731, 58 L.Ed. 818; Sloan v. United States, 118 Fed. 283, 285 (C.C. Neb. 1902), appeal dismissed 93 U.S. 614, 48 L.Ed. 814; Sloan v. United States, 95 Fed. 93, 195 (C.C. Neb. 1899); see also United States v. Pierce, 35 F.2d 885, 888-889 (9th Cir. 1956)). As the courts have also recognized, 25 U.S.C. §345 authorizes suit against the United States for an allotment (Morrison v. Work, supra; United States v. Payne, supra; Harkins v. United States, 75 F.2d 239, 241 (10th Cir. 1967); Gerard v. United States, 57 F.2d 951, 954 (9th Cir. 1948)) and 25 U.S.C. §345 and 28 U.S.C. §1353 empower district courts to grant allotments to Indians (Sloan v. United States, 95 Fed. 193, 195, supra).

Obviously, 25 U.S.C. §345 and 28 U.S.C. §1353 are exceptions to the general rule that courts may not reassess determinations committed by law to agency discretion. As was said in Sloan v. United States, supra, 118 Fed. 283, 290:

"Counsel for the government strongly contend that the court is practically bound to follow the rulings and decisions of the department of the interior in these cases, upon two grounds: First, that the construction given by the department charged with the duty of supervising the affairs of the Indians to the statutes and treaties dealing therewith are entitled to great weight, and in doubtful cases should control the judgment of the court; and, second, that the rights of the claimants present cases of mixed questions of law and fact, which prevents the court from considering the same under the recognized rule that courts will not re-examine questions of fact decided by the department in the disposition of the lands placed in its charge, but are limited to a consideration only of questions of law. When congress adopted the act of August 15, 1894, and amended it by the act of February 6, 1901, conferring upon the circuit courts of the United States jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or

treaty,' and further provided that any one in whole or in part of Indian blood or descent, who claimed 'to have been unlawfully denied or excluded from any allotment or parcel of land,' might bring suit in the proper circuit court for the enforcement of his rights, it certainly must have been the legislative intent to confer upon the courts full authority and right to hear and determine every question arising in any suit brought by a claimant to an allotment. These acts were adopted by congress because it was brought to its attention that many persons, claiming allotments, had been denied that right by the department, and it was sought to make provision for a method whereby such persons could reassert their claims before a judicial tribunal. The real purpose of the acts conferring jurisdiction upon the courts in this class of cases would be practically nullified if the contention of counsel should be sustained to the effect that in all cases wherein the department had ruled against the claimant the courts are bound to follow the decision of the department. The remedial intent of the legislation in question must be given fair and full force, and this imposes upon the court the duty of hearing and deciding all questions of law and fact necessary to the full consideration and determination of the rights of the several claimants."

Thus United States v. Payne, supra, establishes that a court may redetermine whether particular land is suitable for allotment.

Furthermore, even under the Administrative Procedure Act a court may reverse an administrative decision committed by law to agency discretion if the decision was rendered pursuant to a legally erroneous interpretation of the governing law. (Richardson v. Udall, 253 F.Supp. 72, 79 (1966).)

II. NEITHER THE TAYLOR GRAZING ACT NOR WITHDRAWALS, RESERVATIONS, AND CLASSIFICATIONS MADE PURSUANT TO THAT ACT LIMIT AN INDIAN'S CHOICE OF AN ALLOTMENT UNDER 25 U.S.C. 3354.

In 1887 Congress passed and the President signed the General Allotment Act. Section 1 of the act provided that each reservation Indian would be granted restricted title to a parcel of reservation land that the President considered suitable for agricultural or grazing pursuits. Section 4 of the act, now 25 U.S.C. §334, provided then as follows that where a non-reservation Indian settles upon unappropriated Government lands, the Indian is entitled to have the land allotted to him "in quantities and manner" as provided in Section 1 of the act. As the result of several amendments concerning the effect of age and marriage on the quantity of allotted land, Section 1, now 25 U.S.C. §331, reads in relevant part:

"[T]he President shall...whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such [reservation] Indians...cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one-hundred and sixty acres of grazing land to any one Indian."

Section 331 also provides that an Indian can obtain only forty acres of agricultural land if the land may be brought within an irrigation project.

The Taylor Grazing Act, 43 U.S.C. §315-315n (48 Stat. 1269 as amended), was enacted in 1934. Though pronouncing itself as a law "to promote the highest use of the public lands," (43 U.S.C. §315) "the whole purpose of the bill" was to aid the livestock industry. (H.R. Rep. No. 903, 73d Cong., 2d Sess. 2 (1934); S. Rep. No. 1182, 73d Cong., 2d Sess. 2 (1934)). The law authorized the Interior Department

to create grazing districts out of up to 80,000,000 acres of vacant, unappropriated, and unreserved public domain (43 U.S.C. §315), subject to a right of homestead entry on lands more valuable for the production of agricultural crops than native grasses and forage plants. (Act of June 28, 1934, c.865, §7, 48 Stat. 1272.) Then the President, acting pursuant to 36 Stat. 847 as amended by 37 Stat. 497, issued Executive Orders 6910 and 6964. Those executive orders "temporarily" withdrew from settlement all of the unappropriated and unreserved public domain and reserved it pending classification. Congress responded by increasing to 142,000,000 the acreage includable within grazing districts and by the amending Section 7 of the act (43 U.S.C. §315f) to read in relevant part:

"The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry....Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such

application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided....."

Interior Department regulations provide (43 C.F.R. 212.0-3(b)) and the Government maintains that an Indian cannot obtain an allotment until the land sought is classified pursuant to the Taylor Grazing Act as proper for disposal under the General Allotment Act. Several factors suggest that this position is wrong and should be rejected by the court.

First, although the Taylor Grazing Act proscribes all settlement and disposal of public lands in the absence of a classification opening the lands to entry, Indian allotments could be excluded from the act's operation if Congress did not intend allotment to be so restricted. Wood Manufacturers Association v. NLRB, 386 U.S. 612, 619 8 L.Ed.2d 357, 363-364 (1967); NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 72, 12 L.Ed2d 129, 138 (1964); Holy Trinity Church v. United States, 143 U.S. 457, 459, 36 L.Ed 226, 28 (1892).) While the act's legislative history (H.R. Rep. No. 903, 73d Cong., 2d Sess. (1934); S. Rep. No. 1182, 73d Cong. 2d Sess. (1934); H.R. Rep. No. 2050, 73d Cong., 2d Sess. (1934); Hearings on H.R. 2835 and H.R. 6462 before the House Committee on the Public Lands, 73d Cong., 1st & 2d Sess. (1933-1934); Hearings on H.R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 167, 3310, 4224, 6344-6346, 6346-6374, 379, 6414, 9607, 11139, 11147, 11161, 11162, 11419, 11634,

1658, 11745, 11778, 12004, 12167, 12168, 12367, 12576, 12578, 2455 (1934); H.R. Rep. No. 2125, 74th Cong., 2d Sess. (1936); S. Rep. No. 2371, 74th Cong., 2d Sess. (1936); Hearings on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess. (1935); 80 Cong. Rec. 85, 3201, 3815, 3816, 3855, 9316, 9848, 10149, 10478-10480, 10624-10626, 10549, 10696, 10894, 10896 (1936)) shows a conscious limiting of homesteading (House Hearings on H.R. 2835 at 22, 23, 103, 189, 200, 201; Senate Hearings on H.R. 6462 at 36, 65, 66, 86, 88, 92, 126, 178, 196; Senate Hearings on S. 2539 at 51, 72) and veterans' claims (House Hearings on H.R. 2835 at 92, 103, 109), the legislative history reveals no intent to restrict Indian allotment. Neither Congressional ignorance nor the relative insignificance of Indian allotments explains this fact, because the Interior Department's management of grazing on Indian allotments was discussed at some length. (House Hearings on H.R. 2835 at 156-160.)

Second, superimposing the Taylor Grazing Act on the General Allotment Act would repeal part of the latter law. The Allotment Act contemplates 160 acre allotments of land suitable for grazing livestock. The Taylor Grazing Act, however, prohibits the Secretary of the Interior from classifying land as available for a grazing allotment, because if the land's "highest use" (43 U.S.C. §315) is for grazing, it must be retained on the public range, and if the land is most valuable for something other than grazing, it must be classified for that use and not as available for an

Indian allotment to be used for grazing. Thus, one type of allotment, i.e., for grazing, would be legally impossible to obtain as is indicated by the Interior Department regulations which permit lands to be classified for allotment only if they are suitable for the growing of cultivated crops (43 C.F.R. §§2410.1-3(d)(6), 2410.0-5(d)). The presumption is against such a sub silentio repeal. United States v. Zacks, 375 U.S. 59, 11 L.Ed.2d 128 (1963); Silver v. New York Stock Exchange, 373 U.S. 341, 10 L.Ed.2d, 89 (1936); United States v. Borden Co., 308 U.S. 188, 198, 4 L.Ed. 181, 190 (1939).)

Only two reported cases have considered the relation between the General Allotment Act and the Taylor Grazing Act. Finch v. United States, 387 F.2d 13 (10th Cir. 1967) did not consider the arguments made above. The 10th Circuit's reliance on 25 U.S.C. §336, Id. at 15, was misplaced. Section 336 did not amend section 334. (Cf. Jones v. Alfred L. Mayer Co., ____ U.S. ____, 20 L.Ed.2d 1189, 1194, fn. 20 (1968); United States v. Hemmer, 241 U.S. 379, 385 (1916); Relex v. Yaksum, 163 Pac. 481, 485 (Wash. 1917).) Daniels v. United States, 247 F.Supp. 193 (W.D. Okla. 1965) simply assumed that classification pursuant to the Taylor Grazing Act was a prerequisite to allotment. In view of the rule that Congressional legislation must be construed in the way most favorable to Indians (Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 63 L.Ed. 138, 141 (1918); Choate v. Trapp, 224 U.S. 665, 675, 56 L.Ed. 941, 946 (1912); United States v. Celestine, 215 U.S. 278, 290, 54 L.Ed. 195, 199

1909); Arenas v. Preston, 181 F.2d 62, 66 (9th Cir. 1950),
cert. denied 340 U.S. 819, 95 L.Ed. 602; Elser v. Gill
et Number One, 246 Cal.App.2d 30, 36 (1966)) and in view of
the factors not considered in Finch and Daniels, the court
should hold that neither the Taylor Grazing Act nor with-
drawals, reservations, and classifications made pursuant to
that act limit an Indian's choice of an allotment under
5 U.S.C. §334.²

III. THE INTERIOR DEPARTMENT CANNOT RULE THAT
160 ACRES OF UNCULTIVATABLE LAND IS UN-
SUITABLE FOR AN INDIAN ALLOTMENT WHEN THE
DEPARTMENT FINDS THAT AN INDIAN FAMILY
COULD NOT SUPPORT ITSELF BY GRAZING LIVE-
STOCK ON THE LAND BUT DOES NOT FIND THAT
THE INDIAN FAMILY COULD NOT SUPPORT ITSELF
BY OTHER AGRICULTURAL PURSUITS UPON THE
LAND.

In 25 of the cases presented in this appeal the
Government disallowed the applications on the ground that the
land lacked the native plants for a cattle or sheep grazing
ranch capable of supporting an Indian family.³ No considera-
tion was given to raising stock by purchased feed. In one
case (R-05789) the Interior Department considered the raising
of barnyard animals, but rejected the idea because sufficient
food could not be grown on the land and because such a use
Holding that the Taylor Grazing Act does not restrict
an Indian's choice of an allotment will not allow Indians to
select allotments in national parks, national monuments or
national forests. The Taylor Grazing Act does not control
settlement in national parks, monuments, or forests (43 U.S.C.
§15), and Indian allotments in national forests are expressly

was inconsistent with a 160 Acre allotment.⁴ Those decisions represent an unreasonably restrictive reading of the general Allotment Act.

6. The Interior Department also takes the position that a single allotment must support an entire family. (John E. Palmer, supra, 71 I.D. 66, 67-68 (1964).) If several members of the same immediate family (husband, wife, children, and other relatives who are part of the household) seek contiguous allotments, the proper standard would seem to be whether the combined land of the contiguous allotments could support the family.

7. The Government also claims that the Indians did not fully comply with Section 334 because they selected "appropriated" lands and did not settle upon the lands prior to selection. (Appellees Brief at 19).

The Government asserts that the lands were appropriated because they were withdrawn from settlement pending classification under the Taylor Grazing Act. Such an argument is meaningless. If the Taylor Grazing Act amended the Allotment Act, the withdrawn lands would not be available for allotment, unless classified for allotment, whatever the meaning of "appropriated." If, on the other hand, the Taylor Grazing Act was not intended to modify an Indian's rights under the general Allotment Act, withdrawal under the Taylor Grazing Act would not constitute an appropriation as that term is used in the Allotment Act. (continued on page 15)

The General Allotment Act had many objectives. Foremost among them were making the Indians self reliant and ending their nomadic wanderings, tribal relationships, and

The Government's settlement argument is similarly without merit. Finch v. United States, supra, 387 F.2d 13, 16, recognized that if the Taylor Grazing Act governs the granting of allotments, an Indian would have to violate the law to settle on a parcel of land before it was allotted to him. Finch therefore held that settlement is a condition subsequent to allotment. If classification under the Taylor Grazing Act is not a prerequisite to allotment, prior settlement should not be required in these cases, because 43 C.F.R. 2411.1-3 designates as a trespasser anyone who makes an unauthorized settlement on public domain covered by Executive Order 6910. (See also Application for Indian Allotment, question 10.) Moreover, Kenneth and Kristopher Kale indicated in applications R-06186 and R-06187 that they had settled on the parcels sought.

munal systems of land ownership. (Squire v. Capoeman, 351 U.S. 1, 9, 100 L.Ed. 883, 890 (1956); Big Eagle v. United States, 300 F.2d 765, 769-771 (Ct.Cls. 1962); Hollister v. United States, 145 Fed. 773, 776 (8th Cir. 1906); 19 Ops. Att'y. General 232, 233 (1889).) The Act sought to achieve these objectives by giving each Indian citizenship and a parcel of land to be used for a home and for agricultural or grazing purposes on agricultural or grazing land. (25 U.S.C. §331.)

Under the rule requiring legislation to be construed in the way most favorable to Indians (Alaska Pacific Fisheries v. United States, supra, Choate v. Trapp, supra; United States v. Celestine, supra; Arenas v. Preston, supra; Big Eagle v. United States, supra), the Interior Department should construe the Allotment Act in a way that will allow the broadest range of crop and stock raising. Yet the Department has defined "grazing land" (25 U.S.C. §331) as land which "can not be profitably devoted to any agricultural use other than grazing" (43 C.F.R. §2212.0-7(a)(2) [emphasis added]) and has thus precluded an Indian from obtaining a 160 acre allotment for poultry, hog, or feed lot cattle raising. The Government's position is that native grasses and forage are the only feeds that may be considered in determining whether an Indian can profitably engage in the "agricultural" (43 C.F.R. §2212.0-7(a)(2)) pursuit of raising animals on grazing land. (See John E. Balmer, 71 I.D. 66, 67 (1964); letter from Derrel S. Fulwider to James Mitchell re R-05789, December 30, 1964.)

Neither hogs (Anderson & Kiser, Introductory

Animal Husbandry 368-369 (1963); Acker, Animal Science
72-77, 79 (1963)) nor poultry (Ibid.; Wilson, Poultry
Production, Scientific American, July, 1966, p. 58-59) are
grazing animals, and many California cattlemen raise none of
their own feed (Hopkin & Kramer, Cattle Feeding in Calif-
ornia 7 (1965)). Indians were raising turkeys before the
white man came to America (Wilson, Poultry Production, supra,
at p. 57), and Congress considered Indian hog raising while
discussing the desirability of Indian allotments (Congress-
ional Record for January 20, 1881 at 787). Under the rule of
construction favoring Indians, "grazing land" should include
any land unfit for cultivation (Congressional Record for
December 15, 1886 at 192) not just land with enough native
plants for an Indian to profitably graze sheep and cattle.
Surely the Government would not argue that on forty or eighty
acre allotments of agricultural land a farmer would have to
rely exclusively on the land's natural resources and could
not buy seed, fertilizer, or tractors. Why then should an
Indian raising poultry, hogs, or cows not be entitled to rely
on purchased corn, potatoes, or pelleted feed to maintain a
profitable enterprise?⁵

5. This analysis is independent of the Taylor Grazing Act.
If land were more valuable for raising poultry, or hogs, or
feed-lot cattle than for grazing, the land could be classified
as available for Indian allotments even though the land was
classified as grazing land under the General Allotment Act.

IV "UNSUITABLE FOR AN INDIAN ALLOTMENT" IS NOT
A PROPER LAND CLASSIFICATION UNDER THE TAYLOR
GRAZING ACT.

One basis given for rejecting all of the applications except R-06410 through R-06416 was that the lands were classified under the Taylor Grazing Act as unsuitable for Indian allotments. Even assuming that the Taylor Grazing Act modified the Indian Allotment Act, such a classification is not proper.

When a person applies to have land classified under the Taylor Grazing Act, the Secretary of the Interior has a mandatory duty to classify the land for its highest use, i.e., the use for which it is most valuable or suitable. 43 U.S.C. §§ 315, 315f; Richardson v. Udall, supra, 253 F.Supp. at 9 (Idaho 1966).) A classification of unsuitable for an Indian allotment does not indicate in any way what a parcel is most valuable or suitable for.⁶

. According to the Field Examiner's report on application -05789, the sought-after land had been previously classified as proper for title transfer by exchange or sale in order to lock up federal ownership in areas of more concentrated federal holdings. This does not affect the point made in the text. First, the classification decision did not rely on the previous classification. Second, while the Secretary can exchange public domain for private lands, (43 U.S.C. § 315g), or classify lands for disposal because they would have a higher use if not federally owned (43 U.S.C. § 1411), the Secretary can not prevent claims on federal land by classify-

V LAND IS NOT APPROPRIATED WITHIN THE MEANING OF 25 U.S.C. §334 WHEN IT IS ORDERED INTO THE MARKET FOR SALE PURSUANT TO THE ISOLATED TRACT ACT (43 U.S.C. §1171).

The BLM rejected applications R-06410 through R-06416 on the ground that the land in question was "appropriated" (25 U.S.C. §334) when it was ordered into the market for sale at auction under the Isolated Tract Act. Those decisions must be reversed because they unreasonably ignored the rule requiring statutory constructions favoring Indians. The word appropriated has several meanings when used in connection with the disposal of government land. Appropriated usually means set apart for some particular purpose. (Wilcox v. Jackson ex den. McConnel, 38 U.S. 498, 12, 10 L.Ed. 264, 271 (1839).) Sometimes appropriated means

the land for disposal where the classification says nothing about how the land will be used once it is out of federal control. (Richardson v. Udall, supra, at 79.) A parcel's most valuable use is not determined by whether the government will be paid for the land. (Ibid.)

In other cases (e.g., R-05504), the BLM wrote the applicant's letters stating that the best use of the land was for homesites, but classified the land as not capable of serving the purposes of 25 U.S.C. §334. A classification of proper for disposal as homesites would have been proper. (43 U.S.C. §1411.)

old, allotted, or entered. (43 U.S.C. §148.) Occasionally appropriated means reserved. (Contra, 43 U.S.C. §315; United States v. Fitzgerald, 40 U.S. 407, 10 L.Ed. 785 (1841); People v. Commissioner of the State Land Office, 23 Mich. 269 (1871).) Only the Interior Department asserts that United States lands are appropriated when the government has only offered to sell them to anyone, for any purpose, at a public auction.

The Government supports its interpretation by citation to two cases and a regulation. The cases, Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964) cert. den. 381 U.S. 904, and Lewis v. Udall, 374 F.2d 180 (9th Cir. 1967) do not discuss whether an offer to sell under 43 U.S.C. §1171 appropriates land under 25 U.S.C. §334 or any other law. In fact, those cases hold that the Government can refuse to sell to the high bidder at an isolated tract auction.

The regulation, 43 C.F.R. §2243.1-6, provides that lands offered for sale under the Isolated Tract Act are segregated from appropriation under the public land laws. The Government maintains that segregation under section 2243.1-6 constitutes an appropriation within the meaning of the General Allotment Act (Appellees Brief at 26, fn. 8), but such a construction of "appropriated" is inconsistent with the construction of statutes affecting Indians. The regulation is therefore void as applied. (Cf. Government of Guam v. Koster, 362 F.2d 248, 252 (9th Cir. 1966); Smith v. Commissioner of Internal Revenue, 332 F.2d 671, 673 (9th Cir. 1964); Greene v. Deitz, 247 F.2d 689, 692-693

VI SEVEN INDIANS WHO DID NOT PURSUE ADMINISTRATIVE APPEALS ARE NEVERTHELESS ENTITLED TO JUDICIAL REVIEW OF THE INTERIOR DEPARTMENT'S DECISIONS, BECAUSE ADMINISTRATIVE APPEALS COULD HAVE CAUSED THEM IRREPARABLE HARM AND 43 C.F.R. §2243.1-6, WHOSE LEGALITY THE INDIANS CHALLENGE, WOULD HAVE RENDERED THE APPEALS FUTILE.

Applications R-06410 through R-06416 were rejected because the land sought had been ordered into the market for sale under the Isolated Tract Act. Administrative appeals from the BIM field office decisions would have been futile. The Interior Department would necessarily have followed its own regulation, 43 C.F.R. §2243.1-6, and affirmed the initial decisions. Appeals could also have been irreparably damaging; while the appeals were pending, the Government could have auctioned off the land. The Indians therefore filed a lawsuit to enjoin any sale and for declaratory relief.

As the marketing order's effect is solely a question of law, and administrative appeals would have been futile and could have caused irreparable harm, administrative appeals were not a prerequisite to judicial review. (Wolff v. U.S. 43 U.S.C. §1171 provides "this section shall not defeat any valid right which has already attached under any pending entry or location." This does not require an implication that no right may attach after land has been ordered into the market but not sold. Since such an implication would effect a partial sub silentio repeal of the Allotment Act and since sub silentio repeals are disfavored (see p. 12, supra), no such implication should be made.

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vs.

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APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in one count of a three-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in all counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellants Gonzalez-Alonso 1/ and Valdelomar y Dorta 2/, and Gustavo Sanchez, Angel Luis Ruiz-Rodriguez 3/, and an unindicted co-conspirator, and divers other persons unknown to the Grand Jury, agreed, confederated, and conspired together to commit the offenses of knowingly, with intent to defraud the United States, importing, bringing, smuggling, and clandestinely introducing marihuana into the United States from Mexico, without presenting said marihuana for inspection and entering and declaring it, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, said agreement and conspiracy being in violation of Title 21, United States Code, Section 176a [C. T. 2-3]. 4/

Count Two alleged that one Manuel Espinoza-Gutierrez, with intent to defraud the United States, knowingly smuggled, and

1/ Hereinafter referred to as "Gonzalez".

2/ Charged as "Valdemar y Dorta" and hereinafter referred to as "Valdelomar", as he was referred to during the trial.

3/ Hereinafter referred to as "Ruiz".

4/ "C. T. " refers to the Clerk's Transcript, which is Vol. I of the Transcript of Record.

clandestinely introduced from Mexico, approximately 80 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought said marihuana into the United States contrary to law, in that it was not presented for inspection, entered, and declared. It also was alleged that defendants Sanchez and Ruiz and appellants Gonzalez and Valdelomar knowingly aided, abetted, counseled, induced, and procured the commission of the offense [C. T. 4].

Count Three alleged that defendants Valdelomar and Ruiz, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately two pounds of marihuana (in Los Angeles County), which marihuana, as they then and there well knew, had been imported and brought into the United States contrary to law, and that defendant Sanchez and appellant Gonzalez knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 5].

Jury trial of appellants and co-defendants Sanchez and Ruiz commenced on August 10, 1965, before United States District Judge Fred Kunzel [R. T. 3-6]. ^{5/} The Government announced it did not intend to proceed upon Count Two, and that count was dismissed before the jury was sworn [R. T. 6].

Appellants' motion to suppress evidence was heard and denied during the trial [R. T. 4, 63-64]. At the conclusion of the Government's case, a motion for judgment of acquittal was granted

^{5/} "R. T. " refers to the Reporter's Transcript.

as to all defendants upon Count Three and as to defendant Sanchez on Count One [R. T. 223-224, 227-230]. At the suggestion of Government counsel, a motion for judgment of acquittal was later granted as to defendant Ruiz [R. T. 328-329].

Appellants were found guilty as charged in Count One on August 12, 1965 [C. T. 8-9].

Thereafter, on October 1, 1965, appellant Gonzalez was sentenced to ten years in prison and appellant Valdelomar was sentenced to seven years in prison [C. T. 10-11].

Appellants filed timely notices of appeal [C. T. 12-13, 16-17].

III

ERROR SPECIFIED

Appellants specify the following points upon appeal:

1. Alleged error in receiving evidence that was

allegedly illegally seized.

2. Insufficient evidence of existence of a conspiracy.

3. Insufficient evidence of appellants' participation in

a conspiracy.

(Appellants' Opening Brief, pp. 2-3).

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On March 23, 1965, United States Customs Port Investigator Leland L. Riggs 6/ was informed by the Customs Agent-in-Charge, John Brockman, that a reliable informant had told Customs Agent Spohr that a certain 1956 Mercury automobile was loaded with a quantity of marihuana in Tijuana and would cross the international border and enter the United States at San Ysidro, probably on the following morning [R. T. 25-27, 32]. The informant had provided the license number and color of the vehicle [R. T. 41].

At approximately 8 a. m. on March 24, 1965, the 1956 Mercury crossed the international border from Tijuana at San Ysidro and entered the United States. Officer Riggs was advised of this entry [R. T. 25-26, 28, 56-57].

The vehicle was the type and of the year described by the informant, had the color mentioned by the informant, and had the license number and state designation described by the informant [R. T. 41].

Although the officers had made arrangements for search of the vehicle by Customs inspectors as it crossed the border, it was not searched when it crossed. Officers Riggs and Arthur Hanson immediately got into a vehicle and followed the Mercury

6/ Riggs was a Customs Agent at the time of the trial [R. T. 25].

in a northerly direction on the highway. The Mercury had two occupants, including the driver, Antonio Herrera [R. T. 27-29, 42-43, 58].

The vehicles traveled at speeds which varied from approximately 55 to 60 miles per hour. Since the traffic was heavy and the freeway shoulders were quite narrow, Officer Riggs, a former member of the California Highway Patrol, made no attempt to stop the Mercury [R. T. 53-54, 58]. The Mercury left the 28th Street off-ramp on Highway 101 Freeway in San Diego and stopped about 200 yards away from the off-ramp at a point approximately 11 miles from the international border. The officers had taken no action to cause it to half [R. T. 20, 29-30, 43-44].

The officers approached the Mercury and identified themselves. Officer Riggs opened a rear door of the Mercury and noticed that it was extremely heavy. He used a screwdriver to remove a screw and found part of the alleged contraband inside the rear door. He had no search warrant and no warrant of arrest [R. T. 30, 33].

The marihuana was discovered at approximately 8:20 or 8:25 a.m. Additional search of the Mercury occurred at the Customs office in San Diego [R. T. 34, 43].

Appellants also questioned the validity of the arrest of appellant Gonzalez in Los Angeles. No contraband was obtained as a result of that arrest [R. T. 9-11].

The trial Court held that the legality of the arrest of Gonzalez was immaterial and that the search of the Mercury was

a border search. The motion to suppress evidence was denied [R. T. 62, 64].

B. The Trial.

Antonio Herrera had a conversation with a man named Shorty on March 23, 1965. Shorty asked Herrera to take a car to Los Angeles, picking up the car at a Tijuana location if he was willing to do it [R. T. 66-67, 69-71, 87].

On the following day, Herrera talked to Shorty in Tijuana and told him that he would take the car. Shorty told him that he would be paid \$50 for driving the vehicle. Shorty told Herrera to park the car at a specific location in Los Angeles and leave it there for a while [R. T. 71, 82-83].

Herrera obtained the vehicle, picked up another man in order to give him a ride to San Diego, and drove the vehicle into the United States from Mexico at about 8 a. m. on March 24 [R. T. 67-69, 72].

The entry was made in San Diego County. Herrera knew that the vehicle contained marihuana. He declared no merchandise [R. T. 69, 92].

Customs officers followed the vehicle, which was a 1956 Mercury, as it proceeded in a northerly direction on Highway 101 from the port of entry at San Ysidro. Herrera stopped the Mercury in San Diego in order to let the passenger get out at approximately 8:20 a. m. Customs Officer Leland L. Riggs searched the Mercury within the following several minutes [R. T. 72, 88, 154-156]. He

found two packages in a door panel [R. T. 157-158, 173].

Customs Port Investigator Arthur E. Hanson searched the vehicle at a Customs garage and found 38 packages in the door panels [R. T. 170-174]. It was stipulated that a chemist would testify that samples taken from each of the packages consisted of marihuana and that the total weight was approximately 75 pounds. The marihuana had an approximate selling price of \$10 to \$12 per pound in Tijuana, Mexico [R. T. 102-104, 211, 213].

The Mercury had been continuously in Investigator Hanson's view from San Ysidro to the location at which it stopped. Hanson had observed the vehicle as it crossed the border at San Ysidro and had followed it with Officer Riggs [R. T. 170-171, 175-176].

Herrera was arrested after the first two packages were found and after one of them was opened. The two packages found by Riggs were returned to the door panel of the Mercury [R. T. 174, 176].

Herrera ^{7/} told Riggs that Shorty had asked him to bring the car across the line and that he was to turn off the freeway on Seventh Street in Los Angeles and park by the large orange sign [R. T. 162-163]. On the same morning Herrera headed for Los Angeles with a Customs officer in the same Mercury. They stopped at a gasoline station, where Herrera saw Shorty go by in a station wagon. Herrera mentioned this to the officer, who said that Herrera should continue the trip by himself in the Mercury.

^{7/} The transcript refers to Herrera as "Vicuna" in several instances. His full name was Antonio Herrera Vicuna [R. T. 260].

Herrera continued on the journey and was passed by the same station wagon. A man in the station wagon showed Herrera a sign in the side window. The sign was made of cardboard and contained the Spanish words:

"Third and Columbia

Wait." [R. T. 72-74].

Herrera delivered the vehicle to Third and Columbia in Los Angeles. It was the same vehicle in which he had crossed the border that morning. Appellant Gonzalez went around the block a couple of times and then told Herrera to get out of the car. Herrera followed appellant Gonzalez into a store, where Gonzalez asked, "Are you sure you haven't been followed?" [R. T. 75, 77, 94-95].

Herrera replied, "No, not that I know of."

Gonzalez said, "Well, the federal agents are two, two or three blocks behind."

Herrera replied, "I don't know anything about it." Then they discussed a flat tire in the Mercury [R. T. 77-78]. A concealed radio device had been attached to Herrera [R. T. 95-96, 132].

Appellant Gonzalez told Herrera to fix the flat tire and park the Mercury around the corner in back of a Studebaker. He also gave five dollars to Herrera and told him, "You go and stay in a movie or something, and two or three hours later, you come and pick the car up at the same place." [R. T. 77-78, 81-82].

Herrera had the tire fixed at a gasoline station, drove around the block, and saw a Studebaker there. He did not have a chance to park the car, because a man waved to him to stop and

got into the Mercury and drove away. This man was either appellant Valdelomar or co-defendant Sanchez [R. T. 78-81]. He entered the Mercury a few seconds after it was stopped by Herrera [R. T. 259-262].

At 1:50 p. m. on March 24, appellant Valdelomar and co-defendant Ruiz were arrested in the same Mercury automobile in which Herrera had crossed the border at San Ysidro [R. T. 155, 171, 187-188]. The Mercury was moving, and appellant Valdelomar was driving at a point about two blocks from Columbia and about two blocks south of Third Street in Los Angeles [R. T. 188, 195]. The two packages previously found by Riggs were again found in a door panel of the Mercury [R. T. 157, 189-190, 210].

Appellant Gonzalez and co-defendant Sanchez were arrested in a Ford automobile at approximately 2 p. m. on March 24. Sanchez was driving [R. T. 215-216].

Defendant Ruiz testified that he entered the automobile (shortly before the arrest) after appellant Valdelomar told him that he was going to eat and invited Ruiz to go along. Appellants Gonzalez and Valdelomar did not testify [R. T. 231, 239-240, 258].

ARGUMENT

A. APPELLANTS HAVE NO STANDING
TO OBJECT TO THE ADMISSIBILITY
OF THE CONTRABAND.

Appellants Gonzalez and Valdelomar contend that the search of the Mercury in San Diego was unreasonable. Neither appellant was in the Mercury when the search occurred in San Diego and neither appellant at any time claimed any interest in the Mercury nor in the contraband that was seized. The jury was not instructed in regard to the statutory presumption under Title 21, United States Code, Section 176a [R. T. 343-365]. Under these circumstances, appellants had no standing to object to the introduction of the evidence obtained in the search of the vehicle that had been driven by Herrera.

Diaz-Rosendo v. United States,

357 F.2d 124 (9th Cir. 1966).

Here, as in Diaz-Rosendo (at p. 132), the appellants were not on the premises "where the search occurred" and the judgments of conviction "did not flow from the possession" by appellants at the time of the search.

Appellant Valdelomar contends that he has standing because the second alleged overt act charged that he entered an automobile which contained part of the marihuana. The second overt act allegation did not mention the contraband or marihuana [C. T. 3]. Furthermore, Valdelomar's entry in Los Angeles occurred after

the search and after the seizure of the contraband marihuana in San Diego.

In addition, appellant Valdelomar's overt act argument lacks substance because it is not necessary to prove the commission of overt acts in Title 21 narcotics and marihuana conspiracy cases.

Leyvas v. United States,

9th Cir. No. 20,790, January 6, 1967;

United States v. Gardner,

202 F. Supp. 256 (N.D. Cal. 1962).

The overt act allegations in the indictment consisted of immaterial surplusage.

B. ASSUMING ARGUENDO THAT APPELLANTS
 HAVE STANDING TO OBJECT, THE
 SEARCH OF THE MERCURY WAS A
 REASONABLE BORDER SEARCH.

Assuming, for purposes of argument only, that appellants have standing to object to the search of the Mercury in San Diego, it is respectfully submitted that the trial Court was entirely correct in its determination that the search of the Mercury in San Diego was a proper border search.

Neither probable cause nor an arrest is necessary in order to justify a border search.

King v. United States, 348 F.2d 814, 817 (9th Cir.

1965), cert.den. 382 U.S. 926 (1965);

Alexander v. United States,

362 F.2d 379, 381-382 (9th Cir. 1966).

In Alexander, this Court held (at p. 382) that the legality of a border search that is not made in the immediate vicinity of the border "must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search'."

In the instant case, the initial search occurred approximately 11 miles from the border about 20 or 25 minutes after the Mercury entered the United States [R. T. 43-44, 57]. Investigator Hanson had observed the Mercury as it crossed the international border at San Ysidro, and it was continuously in his view from San Ysidro to the location at which it was stopped [R. T. 170-171, 175-176]. 8/

Consequently, it is clear that the fact finder was reasonably certain that the contraband found in the Mercury at the time of search "was aboard the vehicle at the time of entry into the

8/ This evidence was heard during the jury trial rather than during the hearing of the motion to suppress evidence. However, such evidence may be considered upon appeal.

Carroll v. United States, 267 U.S. 132, 162 (1925).

jurisdiction of the United States", which is the test set forth in Alexander, supra.

Appellants assert that the officers waived the right to a border search by letting the vehicle pass the border in the hopes of catching more important conspirators. The evidence demonstrates that the agents planned a search at the port of entry but that the inspectors passed the vehicle through [R. T. 42-43]. However, regardless of the circumstances here, there is no rule providing for "waiver" of the right to make a border search by permitting a vehicle to cross the border or pass the port of entry. On the contrary, the courts have repeatedly upheld border searches which occurred after the initial inspection point or port of entry was passed without search.

King, supra, at pp. 815-818;

Alexander, supra;

Murgia v. United States, 285 F.2d 14, 16-17
(9th Cir. 1960).

In King, supra, the officer deliberately permitted the suspect vehicle to pass the port of entry (footnote, p. 815). This Court upheld the subsequent search as a border search.

C. ASSUMING ARGUENDO THAT THE
 SEARCH WAS NOT A BORDER SEARCH,
 THE OFFICERS HAD PROBABLE CAUSE
 TO ARREST AND SEARCH.

Assuming arguendo that appellants have standing to object and that the search of the Mercury was not a border search, it is respectfully submitted that Officer Riggs had probable cause to search the Mercury and probable cause to arrest Herrera before the search commenced.

An arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F.2d 260, 262 (9th

Cir. 1963), cert.den. 376 U.S. 930 (1964);

Jones v. United States, 326 F.2d 124, 128-129 (9th

Cir. 1963), cert.den. 377 U.S. 956 (1964);

United States v. Salgado, 347 F.2d 216, 217 (2nd

Cir. 1965), cert.den. 382 U.S. 870 (1965);

United States v. Campos, 255 F.Supp. 853, 857

(S.D. N. Y. 1966);

People v. Guerrera, 149 Cal. App. 2d 133, 136 (1957);

People v. Garnett, 148 Cal. App. 2d 280, 284 (1957).

There are two ways in which information given by an informant may be proved to be reliable. Reliability may be shown by past reliability of the informant, or it may be shown by the existence of corroborating facts which add authenticity to the original statements from the informant.

Jones, supra, at pp. 128-129.

In the instant case, reliability of the informant was shown by both methods. Officer Riggs must have reasonably assumed that the informant was reliable in the past, because his officer-in-charge, Agent Brockman, stated that the informant was reliable [R. T. 26-27]. The informant's reliability also was established under the corroborating circumstances doctrine, since the accuracy of the information was plainly evidenced by the subsequent observations of the officers.

The informant had stated that a specific automobile was loaded with a quantity of marihuana and would cross the international border and enter the United States at San Ysidro, probably on the following morning [R. T. 26].

On the following morning, at approximately 8 a. m. , the described vehicle crossed the international border from Tijuana at San Ysidro and entered the United States. Officer Riggs was advised of this entry [R. T. 25-26, 28, 56-57]. The informant had correctly stated the type of vehicle, the year model of the vehicle, the color, the license number, and the state designation upon the license plate [R. T. 41].

In this respect, the case was very similar to Jones, supra, in which this Court held that there was probable cause to arrest after an informant stated that a certain automobile would enter the United States on a certain day or night with narcotics, and the appearance of the vehicle and occupants as predicted "added to the previous reliability of the informant, and gave the government

officers reason to stop appellant." (at p. 129).

Once probable cause to arrest is shown, it is immaterial that the search precedes the arrest.

Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961), cert.den. 369 U.S. 876 (1962).

Furthermore, the officers did not need probable cause to arrest Herrera in order to search, so long as they had probable cause to believe that the vehicle contained smuggled merchandise.

Browning v. United States, 366 F.2d 420, 422 (9th Cir. 1966);

Leong Chong Wing v. United States, 95 F.2d 903, 904 (9th Cir. 1938).

Validity of an arrest is immaterial where the search is based upon reasonable grounds to believe that contraband is present.

Carroll v. United States, 267 U.S. 132, 158 (1925).

Reasonable grounds existed in the instant case.

D. THERE WAS SUFFICIENT EVIDENCE
 TO SUSTAIN THE CONVICTION OF
 EACH APPELLANT.

Appellants argue that there was insufficient evidence of the existence of a conspiracy and insufficient evidence to show that they participated in a conspiracy.

The existence of a conspiracy was clearly shown by Herrera's testimony concerning his agreement with Shorty and his knowledge that the vehicle contained marihuana [R. T. 66-67, 69-71,

82-83, 87, 92].

Since evidence upon appeal must be viewed in the light most favorable to the prevailing party in the trial court, 9/ Herrera's testimony was sufficient to show the existence of a conspiracy.

Once the existence of a conspiracy is shown, slight evidence is all that is required to connect a defendant with the conspiracy.

Diaz-Rosendo, supra, at p. 130;

Sabari v. United States, 333 F.2d 1019

(9th Cir. 1964).

The question, then, is whether slight evidence was introduced against appellants.

Preliminarily, it should be noted that a common marihuana smuggling scheme was employed here. This Court has had occasion to hear a number of cases in which the consignees of large loads of marihuana have arranged for delivery of vehicles upon streets in the Los Angeles area.

Diaz-Rosendo, supra, 357 F.2d 124;

Diaz-Rosendo v. United States, 364 F.2d 941

(9th Cir. 1966);

Cook v. United States, 354 F.2d 529 (9th Cir.1965).

While it should be the policy of the law to obtain a conviction of "the real rascal" in marihuana-smuggling cases, 10/ it is not to be expected that the clever individuals who pick up these loads of

9/ Diaz-Rosendo, supra, at p. 129.

10/ Aguilar v. United States, 363 F.2d 379, 381 (9th Cir.1966).

marihuana from the street will confess or make other serious admissions, allow themselves to be caught with incriminating evidence in their pockets, or employ an automobile whose registration can be traced back to themselves. The primary evidence against such an individual is the fact that he picks up and drives away an automobile which was intended to be loaded with marihuana. This is the primary evidence against appellant Valdelomar, although there are additional factors of importance.

The case against appellant Gonzalez does not require extended discussion. Herrera had been instructed to take the Mercury to Third and Columbia and wait. The Mercury was supposed to have contained about 75 pounds of marihuana [R. T. 72-74, 102-104, 211]. Herrera delivered the vehicle to Third and Columbia. Appellant Gonzalez circled the block a couple of times [R. T. 75, 77, 94-95]. This would be a natural procedure for a marihuana conspirator, who would be expected to study the neighborhood in an effort to ascertain whether law enforcement officers were engaged in surveillance of the Mercury.

Gonzalez finally stopped and told Herrera to leave the vehicle. They entered a store, where Gonzalez asked, "Are you sure you haven't been followed?" [R. T. 77, 94-95]. The choice of the store undoubtedly was for the purpose of engaging in a secure conversation outside of the view of any officers who might be watching the Mercury or Herrera.

Gonzalez told Herrera that the federal agents were two or three blocks behind [R. T. 77], probably making a false statement

in order to test Herrera's reaction. It is significant that Gonzalez mentioned federal agents, as smuggling marihuana is a federal crime, whereas mere possession or transportation of marihuana is more frequently the subject of local law enforcement.

Gonzalez told Herrera to take the Mercury around the corner and park behind a Studebaker. He gave Herrera five dollars and told him, "You go and stay in a movie or something, and two or three hours later, you come and pick the car up at the same place." [R. T. 78, 82]. ^{11/} The guilt of appellant Gonzalez is clear from the evidence.

Appellant Valdelomar apparently was too anxious to wait for Herrera to park the Mercury, for he waved to Herrera to stop after Herrera spotted the Studebaker. (Herrera testified that the man who waved to him and drove away in the Mercury was either Valdelomar or Sanchez. Ruiz testified that Valdelomar drove. Valdelomar was driving when the officer stopped the Mercury [R. T. 78-80, 187-188, 238-239].)

Valdelomar had told Ruiz that he was going to eat and had invited Ruiz to go along. Valdelomar entered the Mercury a few seconds after Herrera stopped [R. T. 239, 259-262]. When the officer stopped the Mercury operated by Valdelomar, it still contained two of the marihuana packages previously found by Riggs in the same Mercury [R. T. 157, 188-190, 210].

The evidence of Valdelomar's guilt also is clear from the

^{11/} Which is fully consistent with Shorty's instructions to Herrera [R. T. 71, 82-83].

record. This conclusion is fortified by his counsel's attempted explanation of Valdelomar's conduct. While Valdelomar did not testify, his counsel argued to the jury as follows:

"He might have stolen the car to begin with. This would make him a thief, but it certainly wouldn't substantiate the case. He may have made a mistake. He might have gotten the wrong car. He might have been repairing the car. He might have been doing many things, if we are going to guess." [R. T. 311].

The suggestion that Valdelomar had previously stolen the Mercury is incredible. Why would he boldly signal a complete stranger, Herrera, and drive away in the Mercury in broad daylight seconds after Herrera stopped the vehicle? (The arrest of Valdelomar occurred at 1:50 p. m. [R. T. 188-198].) One would expect that a thief in full possession of his faculties would wonder why Herrera was driving the Mercury and would wonder where it had been recently.

The suggestion that Valdelomar mistakenly picked up the Mercury is also completely unreasonable, in view of the fact that he waved Herrera to a stop. The repair theory also is unsound, because Valdelomar told Ruiz that he was going to go to eat [R. T. 239]. This testimony by Ruiz also would discredit other imaginary or fanciful theories which might come to mind in the absence of any explanation by Valdelomar.

In the instant case, as in Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960), the jury would be fully justified in finding

a joint criminal venture involving Gonzales and Valdelomar.

Appellants contend that in circumstantial evidence cases, the inference reasonably to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence, citing Fifth Circuit cases (Appellants' Opening Brief, p. 14). This rule has been rejected by the Supreme Court and by this Circuit.

Byrnes v. United States, 327 F.2d 825, note 5a,
pp. 829-830 (9th Cir. 1964).

"The current test is whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt'."

Byrnes, supra, note 5a, p. 830.

The evidence certainly excluded the hypotheses suggested in the jury argument by counsel for Valdelomar (i. e. , stolen car, mistake, etc.).

Appellants state that the evidence "is completely devoid of proof regarding (1) who conspired, (2) when they conspired, or (3) where they conspired." (Appellants' Opening Brief, p. 14). The conspirators included Herrera, Shorty, Gonzalez, and Valdelomar. The time of portions of the conspiracy was well-established by evidence of conversations between Shorty and Herrera, and the subsequent criminal journey. The location (from Tijuana, Mexico, to Los Angeles, California) also was well-established. In these respects, the evidence was analogous to the circumstantial evidence in Cook, supra, and the first Diaz-Rosendo

case, supra, 357 F.2d 124.

Appellants suggest that it is paradoxical that they were acquitted of aiding and abetting the smuggling of marihuana. Count Two, which alleged the aiding and abetting of marihuana-smuggling, was the subject of a Government election not to proceed, before the jury was sworn [R. T. 6]. The reasons for this decision became obvious when the evidence contained no mention of Manuel Espinoza-Gutierrez. Appellants could not aid and abet Espinoza-Gutierrez as alleged in Count Two if the latter had not committed a crime.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON,
Assistant U. S. Attorney.

NO. 21468 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
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APR 14 1967

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2

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On September 1, 1966, a one-count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. ^{1/}

The indictment charged appellant with unlawful possession of a shotgun with a barrel of less than 8 inches which had been made in violation of the internal revenue laws of the United States [C. T. 2].

Appellant was convicted by a jury on September 8, 1966 [C. T. 16]. On September 30, 1966, appellant was sentenced to the

^{1/} "C. T. " refers to Clerk's Transcript.

custody of the Attorney General for four years with eligibility for parole at any time [C. T. 17].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 5851. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II
STATUTES INVOLVED

Section 5821(a) of Title 26, United States Code, provides in pertinent part:

"(a) Rate. There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of \$200 for each firearm so made."

Section 5851 of Title 26, United States Code, provides in pertinent part that:

"It shall be unlawful for any person to possess any firearm which . . . has at any time been made in violation of Section 5821. . . . "

The pertinent portion of Section 5848, Title 26, United States Code, provides:

"The term 'firearm' means a shotgun having a barrel . . . of less than 18 inches in length, . . . or any weapon made from a . . . shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. . . . "

Section 5861 of Title 26, United States Code, provides in pertinent part:

" . . . Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than \$2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court. "

III

STATEMENT OF THE CASE

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, for possessing a shotgun with a barrel cut to eight inches, in violation of Title 26, United States Code, Section 5851. The indictment charged that the appellant possessed the weapon on July 14, 1966 [C. T. 2].

Appellant filed a motion to suppress which was heard and denied on September 8, 1966 [C. T. 16].

Trial by jury was held on September 8, 1966, before the

Honorable Walter E. Craig, United States District Judge, at which time appellant was convicted [C. T. 16].

On September 30, 1966, appellant was sentenced to imprisonment for four years with the provision that he may be eligible for parole at any time [C. T. 18].

Appellant filed a timely notice of appeal and was granted permission to appeal in forma pauperis [C. T. 19, 23].

IV

STATEMENT OF FACTS

A. Evidence of Guilt.

On July 14, 1966, Albert J. Gastaldo, a Los Angeles Police Officer, went to the Victory Savings and Loan Association in North Hollywood, California, where he had a conversation with numerous employees [R. T. 51-52]. ^{2/} Following the conversation, Officer Gastaldo and his partner left the savings and loan association and arrested appellant [R. T. 53].

At the time appellant was arrested, he was carrying a flight bag [R. T. 56]. In the bag the officers found a loaded sawed-off shotgun, with an 8-inch barrel [R. T. 57, 74]. At the same time a note was taken from the defendant's shirt pocket [R. T. 60]. The note stated:

"I'm armed. give me all your bills. Be quiet

^{2/} "R. T. " refers to Reporter's Transcript.

and quick. If you give alarm, you're dead. Give me five minutes before you give alarm. I don't want to hurt anyone if I can help it, but I won't hesitate if I have to. I have a sawed-off shotgun covering you." [Exhibit 3, R. T. 109; emphasis supplied].

At the commencement of the trial, it was stipulated that the \$200 tax required by Section 5821 of Title 26, United States Code, was not paid [R. T. 50].

B. Facts of the Arrest.

On March 24, 1966, Officer Gastaldo personally investigated the robbery of the Victory Savings and Loan Association in North Hollywood [C. T. 12].

On July 14, 1966, he received a phone call from Victory's manager who stated that a man who strongly resembled the one who committed the earlier robbery had been watching the bank for three days [C. T. 11-12].

Officer Gastaldo proceeded to the Association and talked to the employees [C. T. 12]. The employees pointed out appellant who was across the street [C. T. 12]. Several employees stated that appellant strongly resembled the March robber [C. T. 12]. They further stated that he had been sitting on a bench across the street and walking up and down in front of the bank for the past three days [C. T. 12].

Moreover, since the end of April, 1965, Officer Gastaldo

had a wanted bulletin issued by the police with a composite drawing of an individual who had committed several robberies in the San Fernando Valley [C. T. 12; R. T. 24]. According to the Officer, appellant was a "dead ringer" for the person in the composite drawing [R. T. 24].

As Officer Gastaldo watched appellant he crossed the street, walked in front of the Association, looked inside, appeared to see the police officers talking to the manager and another man, and continued walking [C. T. 13].

Officer Gastaldo and his partner left the bank and arrested appellant [C. T. 13]. One of the Officers immediately searched appellant's person and found the note. He then searched the flight bag which appellant was carrying and discovered the sawed-off shotgun [C. T. 13].

V

QUESTION PRESENTED

Was appellant's arrest by Officers of the Los Angeles Police Department based upon probable cause?

VI

ARGUMENT

APPELLANT'S ARREST WAS BASED UPON PROBABLE CAUSE

The sole question raised by appellant in this appeal is the legality of his arrest on July 14, 1966, outside of the Victory Savings and Loan Association in North Hollywood. If the arrest was legal, the sawed-off shotgun and note seized incident thereto was properly admissible.

Agnello v. United States, 260 U.S. 20 (1925).

Prior to the arrest the officer possessed the knowledge that (1) the association had been robbed in March, 1966, (2) according to several employees, appellant strongly resembled the March robber, (3) appellant had been watching the association for three days and (4) he was a "dead ringer" for the robber pictured in the wanted bulletin.

In Brinegar v. United States, 338 U.S. 160, the Supreme Court defined probable cause as follows:

"Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." 338 U.S. 160.

Appellant has argued that there was no showing that the Officer's information was reliable. Research has disclosed no case where it has been suggested or even argued that an officer acts unreasonably when he relies upon information provided by witnesses to and victims of a robbery which he investigated or upon a wanted poster provided by the police department.

VII

CONCLUSION

For the reason herein stated, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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NO. 21469 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ROBERT LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED

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JUN 10 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ROBERT LEE,

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a four-count indictment, following trial by jury [C.T. 2-5, 28] ^{1/}.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code,

^{1/}

"C. T." refers to the Clerk's Transcript of Record.

Sections 2, 498, 2113 (a), 2312, 2314 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant, by intimidation, did knowingly and wilfully take, from the person and presence of Esther Fawcett, the sum of approximately \$1477, belonging to, and in the care, custody, control, management, and possession of, Bank of America, National City Branch, National City, California, which bank was a bank whose deposits were insured by the Federal Deposit Insurance Corporation. It also alleged that Bernard M. Flynn knowingly aided, abetted, counseled, induced, and procured the commission of that offense.

The second count alleged that appellant, with unlawful and fraudulent intent, caused the transportation of a falsely made and forged security in interstate commerce from San Diego County, California, to Seattle, Washington, knowing said security to have been falsely made and forged.

The third count alleged that appellant knowingly and intentionally transported a stolen 1964 Austin Healey Sprite automobile from San Diego County, California, to Tijuana, Mexico, knowing that the vehicle had been stolen.

The fourth count alleged that appellant possessed a forged and

counterfeited military Certificate of Discharge, knowing the same to be forged and counterfeited, and also possessed a falsely altered military Certificate of Discharge, knowing the same to be falsely altered.

Jury trial of appellant upon Counts One and Three of the indictment commenced on January 12, 1965, before United States District Judge John C. Bowen. The remaining counts were severed [R.T. 14-15] ^{2/}.

Appellant was found guilty as charged in Counts One and Three on January 16, 1965 [R.T. 543].

Thereafter, on January 28, 1965, appellant was committed to the custody of the Attorney General for 15 years upon Count One. Imposition of sentence as to Count Three was suspended, and appellant was placed upon probation for five years upon that count [C.T. 28]. Appellant thereafter filed a timely notice of appeal [C.T. 31].

III

ERROR SPECIFIED

Appellant has specified only one point upon appeal:

"It was a denial of due process for the prosecuting attorney to suppress the existence of an eye-witness to the offense alleged in count one of the indictment until after the close of trial and thereafter refuse to identify said eye-witness." (Appellant's Opening Brief, pp. 4-5).

^{2/} "R.T." refers to the Reporter's Transcript.

STATEMENT OF THE FACTS

On the night of October 10-11, 1964, Ensign Roy Lyman Sprague left a red 1964 Austin Healey Sprite automobile parked on Eagle Street in San Diego, California. Ensign Sprague returned to the scene during the early morning hours of October 11. The vehicle was missing [R.T. 26-27]. He had left no keys in the vehicle [R.T. 26-27, 31].

On October 12, 1967, appellant Lee went to the England Lock and Key Shop in San Diego and asked to have keys made for a red 1964 Austin Healey Sprite automobile. When the vehicle was brought to the shop, it had a Rockford key, which is a type of key not normally used in automobiles [R.T. 66-69].

Appellant obtained two ignition keys and two trunk keys without furnishing a "model" key for either location. The trunk was opened by the locksmith who made the key, and appellant examined a sea bag and other items in the trunk. He said that the vehicle belonged to his nephew [R.T. 69-70].

On the following day, October 13, 1967, appellant drove a red 1964 Austin Healey Sprite automobile into the Like-New Paint Shop in San Diego and asked for a change of color in the paint. The vehicle was then painted a white color [R.T. 52-54].

Miss Joan Tongue went to Mexico with appellant on approximately October 14, 1964. They went to Tijuana, Mexico, and returned to San

Diego in a white 1964 Sprite automobile with appellant driving. About three days earlier, appellant had obtained the vehicle and had told Miss Tongue that he had purchased it from a car dealer [R.T. 111-14] .

On November 3, 1964, San Diego Police Officer Robert C. Szymczak observed appellant as the latter operated a white 1964 Sprite automobile in San Diego ^{3/} [R.T. 85-86] .

On the afternoon of October 30, 1964, appellant picked up "his car," a white Austin Healey Sprite automobile, at the Plaza Auto Park in San Diego. He said that he had "a little business" in National City and would return very shortly. He made arrangements with one "Flynn" (whose true name was "Miller") to go with him on the trip [R.T. 235-38].

Appellant Lee entered the Atlas Travel Service Office in National City at a time estimated at 3:30 p.m. on the same date. Using the name of "Willard Rice," he purchased some airline tickets [R.T. 97-98, 104-05]. He then left the office and joined a male individual in a white sports car which was similar in appearance to the 1964 Sprite which appellant was

^{3/} There is additional evidence connecting appellant with the theft and foreign transportation of Ensign Sprague's Sprite. This evidence is somewhat clouded by errors in the Reporter's Transcript. Since sufficiency of the evidence is not an issue in this appeal, no attempt will be made in this brief to unravel this involved factual situation .

later driving on November 3 [R.T. 86, 93, 99-100].

At approximately 5 p.m. on the same date (October 30), appellant walked up to a teller's window at the Bank of America, National City Branch, which was located in National City, approximately six blocks from the Atlas Travel Service office. Appellant displayed a note to a teller. The note contained the writing, "This is a hold up, give me all your money. Don't say anything or I will shoot." [R.T. 106, 155, 157]. Appellant placed his right hand inside his coat, and the teller could see the end of a gun. She took the money out of her cash drawer and handed it to him. He said, "Thank you," and walked away. [R.T. 157] .

The loss amounted to \$1440. The bank deposits were insured by the Federal Deposit Insurance Corporation [R.T. 203, 233-34] .

The bank was crowded at the time of the robbery, and approximately 50 to 60 customers and 45 or 50 employees were present. In addition to the teller, Mrs. Fawcett, ^{4/} another bank employee, Kay Biernacki, observed appellant inside of the bank at approximately 5 p.m. on October 30. Appellant was carrying a white envelope and walking toward the back door [R.T. 207-10, 222-23] . The demand note had been printed on the back of a white envelope. Miss Biernacki smiled at appellant. Employees had been told to smile at the customers [R.T. 157, 223].

^{4/}

Adopting the spelling of her name as it appears in the indictment [C.T. 2] in preference to the spelling in the Reporter's Transcript.

heard a broadcast about the National City bank robbery while appellant and Miller were gone. When appellant and Miller returned to the lot in the car, Stiteler jokingly asked them whether one of them robbed the bank and the other drove the getaway car [R.T. 235, 238].

Miss Tongue saw appellant at midnight on the same day, October 30. Appellant "looked terrible, like he'd been running, like he was frightened from something." [R.T. 116, 133, 143].

Ensign Sprague and a Federal Bureau of Investigation agent looked at Sprague's Sprite at the United Auto Body Shop on January 12, 1965. The Sprite was being repainted red over a white coat which was over an under-coat of red [R.T. 29, 276-77].

Appellant did not testify. Larry Miller testified as a witness for appellant [R.T. 399-426]. Miller had been arrested in connection with the bank robbery in question [R.T. 399-400]. His testimony was impeached upon various points [R.T. 99, 105, 238, 404, 415, 418-19, 422-23, 538].

On January 22, 1965, six days after the verdicts of guilty [C.T. 20; R.T. 543], appellant filed a motion for new trial upon various grounds, including the following:

"Following submission of the case to the jury, counsel for defendant was advised of the existence of an eye-witness to the offense alleged in Count One of the Indictment, which said witness was neither called as a witness by plaintiff nor disclosed to defendant prior to close of trial." [C.T. 21].

The affidavit in support of the motion stated that one of the attorneys for the defendant was advised by the Assistant United States Attorney who tried the case that "at or about the time of the bank robbery a witness had observed a person vaulting a high fence behind the bank. Said Assistant United States Attorney declined to further identify the witness." [C.T. 22].

Appellee filed an Opposition to the motion. In regard to the alleged witness, the Opposition stated that "the observer was a ten-year old boy (now eleven) who stated that he 'was not positive whether he ran down the alley, up the alley, or jumped over the fence.'" [C.T. 25-26].

V

ARGUMENT

A. NON-DISCLOSURE OF THE EXISTENCE OF A 10-YEAR OLD BOY, WHO MAY HAVE BEEN A WITNESS TO EVENTS OCCURRING NEAR THE TIME OF THE CRIME, DID NOT CONSTITUTE REVERSIBLE ERROR.

Appellant contends that it was a violation of his Constitutional rights for the prosecuting attorney to "suppress" the existence of an "eye-witness" to the bank robbery charge.

The existence of the "witness" was not "suppressed." Appellant's counsel stated that the prosecuting attorney informed him of the existence of the "witness" [C.T. 22]. There is no showing that the boy would have been a helpful witness for the defense. On the contrary, the only reference in the record in regard to this question is an indication that the boy would

individual observed outside of the bank "ran down the alley, up the alley, or jumped over the fence." [C.T. 25-26].

Since the robbery occurred inside of the bank and not in the alley, the boy's opportunity to be a witness to the crime was less than the opportunity of the crowd of approximately 50 to 60 customers and 45 or 50 employees who were inside of the bank at the time of the robbery. [R.T. 222-23] .

Even in the unlikely event that the boy could say that the running man was not appellant, the testimony would not have much weight, in view of the fact that two eye-witnesses positively identified appellant as being inside of the bank, the fact that their testimony was uncontradicted (except as to the time of day), and the fact that the running man could easily have been a lookout for appellant during the robbery.

However, disregarding these weaknesses in appellant's position, the basic and fundamental defect in his case is the simple fact that he has made no showing that his defense was prejudiced in any way by the failure to disclose the existence of the "witness."

Rule 52(a) of the Federal Rules of Criminal Procedure provides as

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The United States Supreme Court has stated:

"Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands

ready to correct violations of constitutional rights, it also holds that ' it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' "

Darcy v. Handy, 351 U. S. 454, 462 (1956).

In Kyle v. United States, 297 F.2d 507, 513 (2nd Cir. 1961), the

Court of Appeals stated:

"A recent note contrasts what is thus believed to be the rule that the knowing use of perjured testimony requires reversal even though prejudice is not affirmatively shown, with 'the area of passive non-disclosure of exculpatory evidence, in which prejudice is the central matter of inquiry and the evidence not disclosed is subjected to a critical examination to determine whether it is reasonably likely that a different result would have been reached had the exculpatory evidence been made available.' The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Colum. L. Rev. 858, 863 (1960)."

(Emphasis added).

Had appellant been able to show that the alleged evidence would be "exculpatory" (a showing that has not been made and is quite unlikely in view of the record), "prejudice is the central matter of inquiry"

Appellant notes an indication that the testimony of the witness would not be favorable to his case (Appellant's Opening Brief, p. 8), but he contends that the prosecuting attorney does not have the right to make such a decision.

However, the prosecution is not required to disclose the names of all witnesses to the alleged crime.

Curtis v. Rives, 123 F. 2d 936, 940 (C.A. D. C. 1941).

In Woolomes v. Heinze, 198 F. 2d 577 (9th Cir. 1952), appellant contended that the prosecution suppressed the testimony of ten or more witnesses to the crime. This Court rejected the claim and emphasized the fact that the prosecuting attorney was not aware of any evidence favorable to the accused in connection with those witnesses (at p. 579).

In Jordon v. Bondy, 114 F. 2d 599 (C.A. D.C. 1940), the Court of Appeals held that no Constitutional rights were violated where the prosecution allegedly failed to disclose the names of four eye-witnesses whose testimony apparently would not be helpful to the defense (at pp. 603-05). The opinion indicated that the appeal was frivolous (at p. 606).

In Palakiko v. Harper, 209 F. 2d 75 (9th Cir. 1953), this Court referred to the claim of concealment of witnesses to the defendant's statements and listed this argument among items "so insignificant or tenuous that it is difficult to take them seriously." (at p. 95, n.26)

Had appellant attempted to show that his defense was weakened in some way by the mere passive non-disclosure of the existence of the 10-year old boy, he could have asked the Court for an order directing the disclosure of the name and address. If such a request was unsuccessful,

appellant would have something to talk about on appeal.

Appellant emphasizes the fact that the prosecution was directed to reveal all evidence favorable to the defense. However, this fact is immaterial, as there is no showing that the knowledge of the 10-year old would be favorable to the defense.

It should be added that appellant apparently was aware of the existence of the "witness" before the jurors reached their verdicts [C.T. 22]. Instead of requesting a continuance, he apparently was satisfied to gamble upon the outcome of the jury deliberations.

Aside from cases stating the minority rule to the effect that the prosecution must call all witnesses to the crime,^{5/} the cases cited by appellant are not pertinent to the question whether Constitutional rights are violated by the mere passive non-disclosure of an alleged witness to the crime, where there is no showing that the witness would be helpful to the defense.

^{5/}

The prosecution need not call all witnesses to the crime.

Aycock v. United States, 62 F. 2d 612, 613 (9th Cir.1932), cert. denied, 289 U. S. 734 (1933);

Love v. United States, 74 F.2d 988, 989 (9th Cir. 1935);

Eberhart v. United States, 262 F. 2d 421, 422 (9th Cir. 1958) (appeal dismissed as frivolous);

Cauley v. United States, 294 F. 2d 318, 320 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

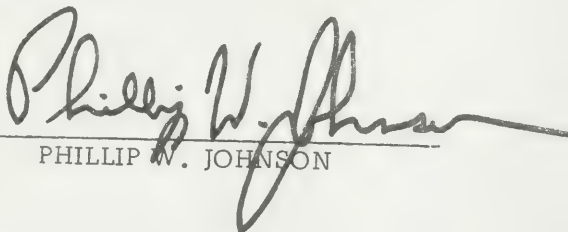
Respectfully submitted,

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I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JUNIOR DOUGLAS STEVENSON and
ELBERT NERO, also known as
ALBERT NERO,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21476 ✓

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21484

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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FILED

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JUNIOR DOUGLAS STEVENSON and
ELBERT NERO, also known as
ALBERT NERO,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21476

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21484

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

A Complaint against Junior Douglas Stevenson and Elbert Nero, also known as Albert Nero, Appellants, was filed before the United States Commissioner at Tucson, Arizona, on May 31, 1966, charging Appellants with a violation of 18 U.S.C., §2312. On June 15, 1966, an Indictment was returned by the Federal Grand Jury sitting at Phoenix, Arizona. (Transcript of the Record, Volume One, Item One. Hereinafter, Volume One of the Transcript of the Record will be referred to as "RC," Volume Two of the Transcript of the Record, i.e., the

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Reporter's Transcript, will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line. Appellants will be referred to as Stevenson and Nero.)

The Indictment charged Nero and Stevenson with having transported a stolen motor vehicle, to-wit: a 1966 Ford Thunderbird automobile, on or about May 11, 1966, from Phoenix, Arizona, to Sonoyta, Mexico, and they then knew the motor vehicle to have been stolen. (RC Item 1.)

On June 23, 1966, by minute entry, the Indictment was forwarded to the Tucson Division of the United States District Court for the District of Arizona from the Phoenix Division.

On July 5, 1966, the Indictment was filed in the Tucson Division. On July 18, 1966, Stevenson and Nero were appointed counsel, Ralph E. Seefeldt, and were arraigned. They pleaded not guilty. On July 20, 1966, the Court set the case for trial on September 6, 1966. The case was reached for trial on September 7, 1966. In Chambers, on September 7, 1966, in the presence of Stevenson and Nero, Ralph Seefeldt made an oral motion to quash the Indictment (RT 4 L 12 to 5 L 6). No motion to continue was made on the record. The Court, Honorable C. A. Muecke, presiding, denied the motion as not timely made even though the Court permitted a hearing on it (RT 17 L 6-18). The trial was held on September 7, 1966, and the jury returned a verdict of guilty as to both Stevenson and Nero (RC Items 2 and 3).

On September 19, 1966, Stevenson and Nero were each sentenced by Judge C. A. Muecke to five years, subject to parole at any time in the discretion of the Board of Parole, pursuant to the provisions of 18 U.S.C., §4208(a)(2).

The Petition to appeal in forma pauperis was filed on Sep-

tember 26, 1966 (RC Item 7). The Order permitting the appeal in forma pauperis was entered on October 13, 1966, and the Notice of Appeal, which was lodged on September 26, 1966, was filed on October 13, 1966 (RC Items 7, 8 and 9).

This appeal is pursuant to 28 U.S.C.A., §1291.

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II. STATEMENT OF FACTS

Elwyn Harder, business manager and secretary-treasurer of Bob Brewer Ford of Phoenix, Arizona, found two Ford Thunderbird automobiles missing the morning of May 11, 1966, from their car lot (RT 31 L 13 to 32 L 8). Harder identified Exhibits 1 and 2 as the manufacturer's statement of origin for the two Thunderbirds (RT 32 L 15-22). One Thunderbird, a pink one, was recovered in Sonoyta, Mexico, and the other, a gray one, in Gila Bend, Arizona (RT 35 L 1-8).

Melendez Olivas, through an interpreter, testified that Nero and Stevenson came to his garage in Sonoyta, Sonora, Mexico, driving a metallic pink Ford Thunderbird, and tried to sell him two tires in exchange for \$10.00 and two old tires (RT 44 L 8 to 46 L 6). Olivas took them to the Limon Gas Station, and Nero and Stevenson then offered to sell Olivas the car itself if Olivas could find a buyer (RT 46 L 12-23) for \$600.00 (RT 47 L 1).

Ramon Figueroa Medina, Chief of Police, Sonoyta, Sonora, Mexico, testified he saw them at the Limon Gas Station in Sonoyta, Sonora, Mexico, in the company of Melendez Olivas (RT 56 L 17 to 58 L 25). He took them into custody

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and held the Thunderbird (RT 63 L 22 to 64 L 14).

Government's counsel asked to approach the bench and out of the hearing of the jury, stated the next witness was a Maricopa County Deputy Sheriff who had recovered a gray 1966 Ford Thunderbird, with its motor burned out, in Gila Bend, Arizona, and that Gila Bend was on the route from Phoenix, Arizona, to Sonoyta, Sonora, Mexico (RT 72 L 22 to 73 L 5). Since defense counsel objected the evidence was not offered (RT 73 L 8 to 74 L 3).

Nero testified in his own defense and stated he met Stevenson in Phoenix, Arizona, on the night of May 10, 1966, and they met a Mexican-American gentleman by the name of Tony Perez, who offered them a ride to Mexico (RT 84 L 10 to 85 L 16). They arrived at Sonoyta, Sonora, Mexico, on the morning of May 11, 1966, in a dark blue Ford, not a Thunderbird (RT 86 L 14 to 87 L 11).

They went to a bar and started drinking, and they lost Tony Perez (RT 87 L 14-16). They looked for him and found a 1966 Thunderbird with Arizona license plates in front of a bar (RT 87 L 16-24). They went in the bar and found a stranger who said he owned the Thunderbird (RT 87 L 25 to 88 L 4). They asked him for a ride, but he had no money either (RT 88 L 4-6). Nero suggested to try and sell the tires and the stranger agreed (RT 88 L 6-25). Nero and Stevenson took the car and went to Olivas' establishment and tried to sell the tires (RT 89 L 1-7). Nero denied trying to sell the car (RT 89 L 8-11). He stated he didn't understand that Figueroa asked him for papers to the car (RT 89 L 21-24). Nero was impeached by the prior conviction of a felony (RT 96 L 24).

Trial counsel made an offer of proof by Nero testifying

he was taken into custody in Sonoyta and taken to the port of entry at Lukeville, Arizona, and delivered into the custody of Maricopa County Deputy Sheriffs and transported from Lukeville through Ajo to Gila Bend, and from Gila Bend to Phoenix, Arizona (RT 114 L 17-19). The charges were dismissed after two hearings and they were turned over to a Federal Marshal. They were supposed to have had a preliminary hearing on June 17, 1966, but the Indictment superseded it (RT 114 L 20 to 115 L 4).

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III.

OPPOSITION TO SPECIFICATION OF ERRORS RELIED ON

Appellants were deported by the Republic of Mexico as undesirable aliens and were taken into custody by State of Arizona officials, and there were no extradition proceedings.

IV.

SUMMARY OF ARGUMENT

1. There was no evidence of an extradition proceeding by the United States of America in the Republic of Mexico.
2. The Motion to Dismiss was not made timely.

V.

ARGUMENT

1. There was no evidence of an extradition proceeding by the United States of America in the Republic of Mexico.

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The record made by the Appellants consists of their oral Motion to Dismiss (RT 4 L 12 to 5 L 6), and Appellants' assumption it was done by extradition (RT 6 L 1-4). At the close of the case the Appellants offered the testimony of Nero (RT 111 L 6 to 112 L 11) to the effect that he was escorted to the Border at Lukeville on May 11, 1966, in handcuffs by Mexican officials; at the Border American officials put handcuffs on them and escorted them to Phoenix, via Ajo and Gila Bend, Arizona.

The right of a sovereign nation, such as the Republic of Mexico, to deport undesirable aliens is well recognized. Here in the United States of America it is done by voluntary departure and by deportation proceedings. (See 8 U.S.C.A., §1252, for deportation of aliens from the United States of America, and 8 U.S.C.A., §1254(f), for voluntary departure of aliens from the United States of America.)

Appellants cite *Glucksman v. Henkell*, (1910), 221 U.S. 508, as authority for the proposition that "formalities of extradition are, however, many times waived by the countries which have treaties." In the *Glucksman* case there were documents accompanying *the demand* for Glucksman.

In the case herein, there was no evidence of a demand by the United States of America for Nero and Stevenson much less documents from the State (Maricopa County) even in their offer of proof.

The quotation from *Terlinden v. Ames*, (1902), 184 U.S. 270, in Appellants' Brief on page 7 is from page 289 of the Opinion and sets out what appears to be a complete sentence. The sentence, however, is as follows:

"Extradition may be sufficiently defined to be the surrender by one nation to another of an individual

accused of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, *demand his surrender.*" (Emphasis supplied)

There being no evidence of a demand for their surrender (much less was there one in fact), it is respectfully submitted there was no evidence of an extradition.

In *Dominguez v. State* (Tex. Crim. Ct. of Apps. 1921), 234 S.W. 79, 18 ALR 503, the defendant, a Mexican citizen, was seized in Mexico by American soldiers pursuing raiders. He was not a raider and was released by American soldiers to the Texas Rangers and charged with murder. The defendant in that case, in a preliminary plea, asserted want of jurisdiction over his person. The Texas Court held there could be no jurisdiction of the defendant until he voluntarily submitted himself to the jurisdiction of the Court or until the Mexican Government consented to it, since the defendant was a Mexican. (Under the Treaty, the Mexican Government has the discretion when the defendant is a Mexican citizen—see 18 ALR at p. 508).

Furthermore, *assuming for the purpose of argument* the Arizona State Authorities had illegally secured the Appellants from Mexico, it is respectfully submitted there would still be jurisdiction of the Court to try them.

"§381. Right to try person brought within jurisdiction illegally.

"Where a person accused of a crime is found within the territorial jurisdiction wherein he is charged, and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the

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court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings." 21 Am. Jur. 2d, 401.

Cited as authority for this proposition is *Frisbie v. Collins*, (1952), 342 U.S. 519, 96 L.Ed. 541, 72 S. Ct. 509, rehearing denied 343 U.S. 937, 96 L.Ed. 1344, 72 S.Ct. 768.

2. The Motion to Dismiss was not timely made.

Nero and Stevenson were appointed counsel on July 18, 1966. Not until the morning of trial did they attempt to raise the issue. The Court held it was not timely made (RT 17 L 7-10).

In 21 Am. Jur. 2d 400, §379, source of jurisdiction; consent; waiver, it is stated:

"... But jurisdiction of the person of the defendant may be acquired by consent of the accused or by waiver of objections. If he fails to make his objection in time, he will be deemed to have waived it. Such an objection is also waived by pleading not guilty and going to trial. The accused cannot raise the question for the first time in the Appellate Court."

See also *Ford v. United States*, (1926), 273 U.S. 593, at p. 606, 71 L.Ed. 793, 47 S.Ct. 531.

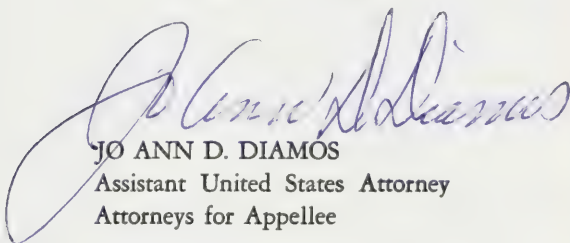
VI. CONCLUSION

It is respectfully submitted there was no evidence of an extradition of the Appelants by the United States of Amer-

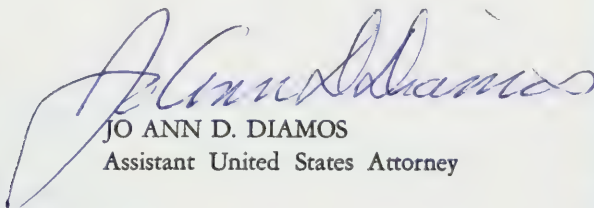
ica, and, further, the Motion to Dismiss was not timely made, and, therefore, jurisdiction over their persons was waived by Appellants.

Respectfully submitted,

RICHARD C. GORMLEY
United States Attorney
For the District of Arizona


JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.


JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this

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**United States
Court of Appeals**
for the Ninth Circuit

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GEORGE GALLION,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

BRIEF OF APPELLEE

FILED

AUG 7 1967

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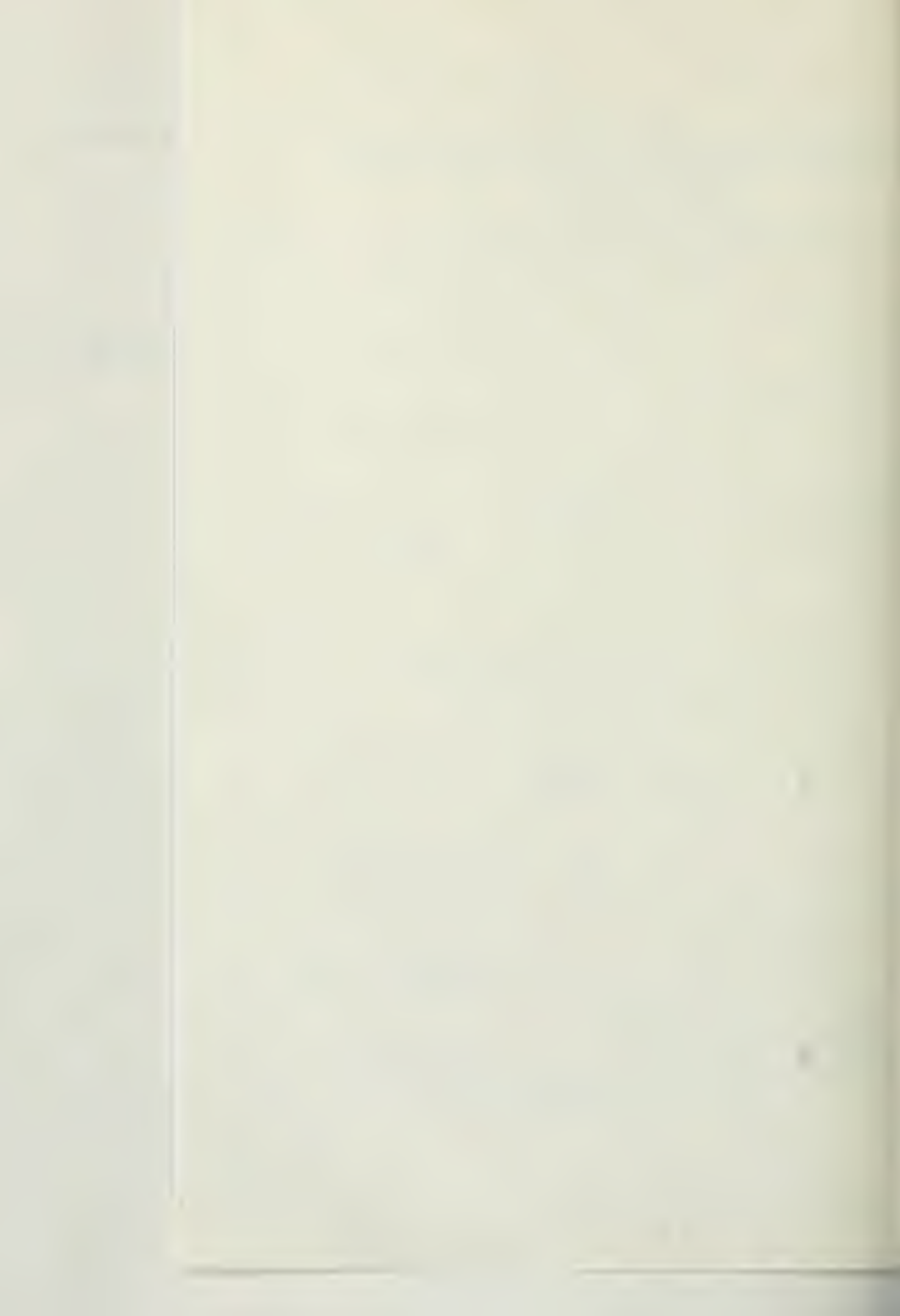
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**United States
Court of Appeals**
for the Ninth Circuit

GEORGE GALLION,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. 3231. This Court has jurisdiction by virtue of 28 U.S.C. 1291. The indictment charges an offense against the laws of the United States.

STATUTES INVOLVED

18 U.S.C. Sec. 2314. Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; . . ."

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

COUNTER-STATEMENT OF THE CASE

Appellant, George Gallion, was picked up by a man named Russell Frey while hitchhiking (TR. 8)¹ and they traveled together for about a week (TR. 2). Gallion stole two wallets belonging to Frey from their motel room in St. Paul, Minnesota (TR. 8, 13). The wallets contained Frey's identification (TR. 8), Frey's Arlington, Texas driver's license (TR. 10, 30), credit cards (TR. 9) and pictures of Frey and his family (TR. 63).

Gallion left St. Paul and went to Minneapolis, where he rented a car utilizing Frey's identification. The car was driven to Billings, Montana, and abandoned. Another car was rented and driven to Portland, Oregon, where it was also abandoned. On his trip east from Portland to Chicago, Gallion again rented a car, abandoned it in Omaha, Nebraska, and rented finally another car which was abandoned in Chicago (TR. 8).

Gallion registered at the Hilton Hotel under Frey's name while in Portland on November 14, 1965, (TR. 22) and signing as "Russell Frey" cashed the check in question in this case (Ex. 1), drawn on the First National Bank of Arlington, Texas, payable to the "Hilton" (TR. 21). The check went through the

¹As used hereafter TR. denotes the transcript of proceedings, R. the record on appeal, Ex. the government's exhibits at trial, and App. Br. appellant's brief on appeal.

normal check collection process and was presented for payment to the First National Bank of Arlington, Texas, where it was dishonored due to an improper signature (TR. 21).

On November 15, 1965, Gallion registered himself and a woman at the Lamplighter Motel in Astoria, Oregon, as Mr. and Mrs. Russell Frey (Ex. 4) and stayed at the Lamplighter for two days (TR. 24). The motel bill was paid by using Frey's American Express credit card. Gallion also cashed another check drawn on the First National Bank of Arlington (Ex. 3) payable to the Lamplighter Motel (TR. 25).

When interviewed by F.B.I. Special Agent Allan Lavanger at the Hilton Hotel in Chicago, on November 23, 1965, Gallion gave a detailed account of his activities (TR. 8, 9) which were corroborated by subsequent F.B.I., investigation (TR. 13). He did not claim that he believed he was Russell Frey while using Frey's identification during the interview. When arrested on December 3, 1965, Gallion told Lavanger that "everything he had said previously as far as he could recall was correct" (TR. 13). Gallion was indicted on June 13, 1966 (R. 1), and plead not guilty at arraignment on July 27, 1966 (R. 3). On August 10, 1966, Gallion waived his right to a trial by jury (R. 4), and trial commenced on August 25, 1966 (R. 5).

During the trial, the government's handwriting expert, Palmer Tunstall, testified that Gallion had signed the check (Ex. 1) in question (TR. 31), that there was some indication that Gallion had attempted to disguise his handwriting (TR. 31), that Gallion in signing Frey's name used a handwriting very similar to Frey's but different from the handwriting used in signing his own signature (TR. 33), that if Gallion had never seen Frey's signature it would have been unlikely that his handwriting in signing Frey's signature would have been as similar as it was (TR. 71), and that as the signature on the check appeared to have been written at a normal speed, this could indicate that Gallion had practiced Frey's signature (TR. 69, 70).

Gallion testified that he could not remember having committed any act as Russell Frey, although he did remember Frey (Tr. 51, 52).

Dr. Rogers Smith, the court-appointed psychiatrist, testified on behalf of defendant that Gallion was suffering from a "classical dissociative reaction" (TR. 54), that Gallion had had a history of fugue periods (TR. 54), that Gallion was probably in a fugue state or a period of fugue states from April to November of 1965 (TR. 72) [" . . . The fugue state period is this period of amnesia of sudden onset and sudden termination of the term" (TR. 55) * * * "An individual who has this,

demonstrates a sudden onset or beginning sudden termination of a period which may last some hours up to months. A period during which they may either lose identity or have a substitute identity. * * *” (TR. 54)], that there is generally total amnesia for the events of the fugue period although in some cases there can be a later recovery (TR. 61), that Gallion while in a fugue state would have thought that his appearance had changed quite a bit and would have been confused if he had looked at Frey’s picture in one of the wallets (TR. 63), that Gallion possibly had a better memory than he indicated on the witness stand, and that if Gallion had tried to conform his handwriting as closely as possible to that of Frey’s, Gallion “. . . probably wasn’t in a fugue state at the time because there would be no reason for him to have to practice his signature” (TR. 69).

On August 30, 1966, Gallion was found guilty (R. 10), and was sentenced to 7 years imprisonment on October 19, 1966 (R. 12). The opinion of Judge Solomon is attached as an Appendix to this brief.

ARGUMENT

I

The Evidence is Sufficient to Support a Finding that Appellant Knew He Was George Gallion and Not Russell Frey.

Appellant's defense was based upon the court-appointed psychiatrist's testimony that the appellant was in a "fugue state" and believed he was Russell Frey when he forged the check (Exhibit 1.) which was the subject of the Indictment. The trial Court found that the appellant

" . . . knowingly gave Dr. Roger Smith false information in order to get Dr. Smith to testify that he was in a fugue state on or about November 14, 1965," . . . and that the appellant . . . "was not in a fugue state, knew he was not Russell Frey, and that he . . . had the requisite intent to commit the offense." (R. 9).

The trial court's finding that the appellant was not in a fugue state is not inconsistent with Dr. Smith's diagnosis on the facts given to him. Since it was based on false information knowingly supplied by the appellant (R. 9), the diagnosis was not binding upon the court.

Expert opinion rises no higher than the reasons upon which it is based and it is not binding upon the trier of the facts. *Dusky v. U.S.*, 295 F.2d 743, 754. (C.A. 8, 1961).

“ . . . one of the most generally accepted rules in all jurisprudence, state, and federal, civil and criminal, is that the questions of the *credibility*, and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is contradicted.”

Mims v. U.S., 375 F.2d 135, 140 (C.A. 5, 1967) and cases therein cited in footnote 2. See also *Holm v. U.S.*, 325 F.2d 44, 46 (C.A. 9, 1963), where this court upheld jury instructions to the effect that the jury could reject the expert witness's testimony in its entirety if the reasons given in support of the opinion were unsound.

The trial court's finding that appellant knowingly gave Dr. Smith false information was amply supported by the record. Appellant disguised his handwriting (TR. 31) and practiced Frey's signature (TR. 69, 70) which he would not have done if really in a fugue state (TR. 69).

Appellant gave a detailed account of his activities when interviewed by the FBI in Chicago (TR. 8, 9) but at trial could not remember having committed any act as Russell Frey (TR. 51, 52). A person who has just come out of a fugue state normally has total amnesia for the events of the fugue period with a possibility of later recovery (TR. 61). Appellant, however, did not discover his amnesia until he took the witness stand.

Appellant rented numerous cars during his hypothetical fugue period and abandoned them all (TR. 8). If appellant really believed he was Frey, he would not have had any reason for abandoning the cars and would have driven one car all the way, or at the very least, would have returned the cars to the appropriate rental agency.

II

The Evidence is Sufficient to Support a Finding that Appellant Knew the Check was Falsely Made or Forged.

Appellant's contention to the contrary is without merit. Since the appellant knew he was not Russell Frey when he signed Frey's signature, he necessarily must have known that the check was falsely made or forged.

Barry v. U.S., 287 F.2d 340 (C.A. D. C., 1961) cited by Appellant (App. Br. 5), is consistent with the Government's position. In that case the Court of Appeals held that where the defendant was charged with distributing a falsely made and forged security in interstate commerce it was error for the trial Court not to instruct the jury that the government must establish knowledge on the part of the defendant that the check was falsely made and forged.

Appellant's quotation from the *Modern Federal*

Practice Digest ("16A F Pr. Dig. 668") (App. Br. 6), that "Evidence which is as consistent with innocence as with guilt does not warrant conviction," is an abstract proposition of law with which the government has no quarrel. It simply has no application in this case.

III

There is Sufficient Evidence to Support a Finding that Appellant Acted with Unlawful or Fraudulent Intent.

When the appellant forged the check knowing he was not Russell Frey, he had the necessary unlawful or fraudulent intent. "The requisite intent exists where one obtains money or something of value in exchange for a check which he knows to be forged and which is drawn upon, and must be forwarded for collection to, a bank in another state." *Halfin v. U.S.*, 324 F.2d 52, 55 (C.A. 10, 1963); *U.S. v. Sheridan*, 329 U.S. 379 (1946).

Appellant in his brief states at pages 6 and 7:

" . . . it cannot seriously be contended that a statute which *expressly* requires that the *intent* to transport such items interstate be 'unlawful' or 'fraudulent' contemplates that such unlawful or fraudulent intent is to be assumed by the mere negotiation of the check."

Appellant cites no authority for this proposition which

is directly contrary to the well settled principle of law stated *supra*.

IV

Appellant was Guilty of Forging the Check in Violation of 18 U.S.C. §2314 as a Matter of Law When He Signed Russell Frey's Name Knowing He Was Not Russell Frey.

The government concedes that if appellant actually believed he was Russell Frey he would not have violated 18 U.S.C. §2314 at the time the check (Ex. 1) was signed. *Wright v. U.S.*, 172 F.2d 310 (C.A. 9, 1949); *Martyn v. U.S.*, 176 F.2d 609 (C.A. 8, 1949); *Melvin v. U.S.*, 316 F.2d 647 (C.A. 7, 1963).

In *Wright v. U.S.*, this court held that where the appellant in Arizona drew a check in his own name on an existing bank in Utah in which he had no money, appellant had not "falsely made" or "forged" a check in violation of 18 U.S.C. §2314. In this case the trial court has found that Gallion knowingly drew the check (Ex. 1) in another person's name.

But appellant argues that even if he knew he was George Gallion and not Russell Frey, there was still no violation of 18 U.S.C. §2314 under the holding in the *Wright* case because the check ". . . was exactly what it purported to be and was drawn by one acting under the name by which he was commonly known at the time" (App. Br. 9).

The language in the *Wright* case upon which the appellant relies is not part of the holding but is written by the court in explaining two cases from the Supreme Court of Arkansas:

"In each of the two cited cases, the Supreme Court of Arkansas held that the drawing of a bank check in the true name of the drawer, or in the name by which he was commonly known, with intent to defraud, did not constitute forgery." *Wright v. U.S.*, 172 F.2d 310, 311.

The government interprets this statement as including those situations in which a person's true name would not be the name under which he is customarily known.

No reasonable interpretation of this language could exempt one who is using an assumed name for a limited time primarily for the purpose of engaging in criminal activities.

CONCLUSION

Appellant had a fair trial. There is substantial evidence to support the Court's findings which are assigned as error and the Court's verdict of guilty upon the Indictment. Appellant's assignments of error are not well taken. The District Court's verdict of guilty should be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of August, 1967

SIDNEY I. LEZAK
United States Attorney

APPENDIX**DISTRICT COURT'S OPINION**

SOLOMON, Judge:

Defendant was indicted for having unlawfully, knowingly and wilfully caused to be transported in interstate commerce a falsely made, forged and counterfeited security. Specifically, the indictment charges that the defendant on or about November 14, 1965, cashed a check on a Texas bank, using the name Russell C. Frey, which check he knew to be forged at the time he presented it to the Portland Hilton Hotel.

Defendant pleaded not guilty. He asserts that he does not remember having cashed the check and does not remember any of the events that took place for several days either before or after the cashing of the check. Defendant also asserts that he did not have the requisite criminal intent because, at the time of the alleged offense, defendant asserts that he was in a fugue state. That is, defendant thought he was the man whose identity he assumed at the time he entered the fugue state.

Dr. Rogers Smith, the court-appointed psychiatrist, on the basis of statements made by defendant to him and reports which he examined, concluded that defendant periodically goes into a fugue state and that

in all probability he was in such a state at the time the check was cashed.

Prior to the cashing of the check in Portland, defendant had traveled with a Russell Frey for about a week. When they were in Minneapolis, Minnesota, the defendant stole two wallets of Russell Frey, rented a car in Frey's name, and proceeded west. Thereafter, defendant rented a number of cars which he abandoned at various points along the way. Defendant drove one of such cars to Portland, and registered at the Portland Hilton Hotel under the name of Russell Frey. He issued a countercheck in the sum of \$25.00, drawn on the First National Bank of Arlington, Texas, which bank returned it unpaid.

Within one or two days of the time that the defendant issued the check to the Portland Hilton, defendant was in Astoria, Oregon, in the company of a woman not his wife. They registered at the motel under the names of Mr. and Mrs. Russell Frey. Defendant used an American Express Credit card to pay for his room and issued another check to the motel on the First National Bank of Arlington, Texas, to obtain some cash.

Approximately a week later, defendant registered at the Conrad Hilton Hotel in Chicago, Illinois. When the management discovered that the defendant was not the same person whose identification cards he carried, one of the assistant managers called upon the defendant and asked for an explanation. Defendant asked

to talk to an FBI agent. When the agent arrived, defendant told him that he had suffered from mental lapses, and then gave the agent a detailed account of the theft of the wallets, the places where he had rented cars, and the cities in which he abandoned those cars. He also gave the agent much other information about which he now testifies he has no memory.

The defendant used the identification in the wallets of Russell Frey in order to rent cars, pay hotel bills, and obtain cash. He now asserts that he was in a fugue state and thought that he was Russell Frey during the period in which these activities took place. One of the pieces of identification in the wallet was a Texas driver's license which had a picture of the true Russell Frey. According to Dr. Smith, if defendant looked at the picture even in a fugue state he would know that he was not the true Russell Frey. The signature on the forged check is similar to the signature of the real Russell Frey and is different from the defendant's own handwriting. According to Dr. Smith, if defendant thought he was the real Russell Frey there would have been no occasion for defendant to have disguised his own handwriting and to have copied the signature of the real Russell Frey.

All of these circumstances, and particularly the detailed account of defendant's activities from the time he stole Frey's wallets in Minneapolis until he was visited by an FBI agent at the Conrad Hilton Hotel in

Chicago, convince me that he knowingly gave Dr. Rogers Smith false information in order to get Dr. Smith to testify that he was in a fugue state on or about November 14, 1965. I also find that the government has proved beyond a reasonable doubt and to a moral certainty that the defendant at the time he forged the signature of Russell Frey and cashed the check at the Portland Hilton Hotel was not in a fugue state, knew that he was not Russell Frey, and that he, the defendant, had the requisite intent to commit the offense.

Gus J. Solomon
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID MANNING,

Petitioner and Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
and LAWRENCE E. WILSON, Warden, et al.,

Respondents and Appellees.

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID MANNING,)
)
 Petitioner and Appellant,) No. 21484
)
 vs.)
)
 THE PEOPLE OF THE STATE OF CALIFORNIA,)
 and LAWRENCE E. WILSON, Warden, et al.,)
)
 Respondents and Appellees.)
)

APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On June 12, 1964, a preliminary hearing was held in the Los Angeles Municipal Court on a complaint which charged the appellant, David Manning, petitioner below, with the felony offense of robbery, a violation of section 211 of the California Penal Code (RT 13).^{1/}

1. "RT" refers to the reporter's transcript of the hearing in the district court.

As a result of that hearing appellant was bound over to the Superior Court of Los Angeles County where he was arraigned and entered a plea of not guilty (RT 14-15). On August 5, 1964, petitioner again appeared in the Superior Court, represented by privately retained counsel and changed his plea to guilty (RT 15, 82-83). On September 4, 1964, petitioner was arraigned for judgment. Probation was denied and he was sentenced to state prison for the term prescribed by law.

Petitioner did not appeal but instead subsequently applied to the appropriate state courts for relief on habeas corpus.

B. Proceedings in the federal courts.

On September 1, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1-33).^{2/} On September 9, 1965, an order to show cause was issued (CT 35), and on September 29, 1965, appellee, respondent below, filed a return to the order to show cause and points and authorities in opposition to habeas corpus (CT 36). On or about October 14, 1965, appellant filed a traverse (CT 44).

On October 21, 1965, Judge Zirpoli of the District Court appointed counsel to represent appellant

2. "CT" refers to the clerk's transcript, filed in this Court as Volume One of the Transcript of Record.

and set the matter for an evidentiary hearing. That hearing was conducted on November 12, 1965.

On October 31, 1966, Judge Zirpoli filed his opinion and order denying the writ (CT 50).

On November 15, 1966, appellant filed a notice of appeal (CT 61), and on November 17, 1966, Judge Zirpoli granted him leave to proceed in forma pauperis and issued a certificate of probable cause (CT 57, 60).

STATEMENT OF THE FACTS

The evidence supporting the charge of robbery to which petitioner pleaded guilty in the Superior Court of Los Angeles County is set forth in the reporter's transcript of the preliminary examination, a copy of which was introduced in evidence at the hearing before Judge Zirpoli (Pet. Exh. 1; RT 13). At that preliminary hearing Sergio Valdez, a service station attendant, testified that while he was working at his place of employment on May 23, 1964, he was robbed at gun point of \$24 (PRT 2-4).^{3/} He specifically identified appellant as the robber (PRT 5). Charles J. Severs, a Los Angeles County Deputy Sheriff, testified that on May 25, 1964, at approximately 9:30 a.m. at the Firestone Station he had a conversation with appellant (RT 7-8). In this

3. "PRT" refers to the reporter's transcript of the preliminary examination.

conversation appellant freely and voluntarily confessed that he had robbed Valdez (PRT 8-10). Though appellant was represented by counsel at the preliminary hearing no objection was made to the testimony of the officer respecting appellant's extrajudicial confession.

At the hearing before Judge Zirpoli it was established that appellant had not been admonished as to his right to remain silent and his right to consult with counsel before he made his confession, and that he did not request an opportunity to consult with counsel (RT 10-11, 22-24).

William Herbert Hall, a member of the Los Angeles bar specializing in the practice in the practice of criminal law, testified that he had been retained to represent appellant in the Superior Court proceedings (RT 82-83). Mr. Hall testified that he advised appellant to plead guilty because of the overwhelming weight of the evidence against him, including the confession, although he realized from his experience that a confession was always subject to challenge in a trial court (RT 83-84, 89). Mr. Hall had read a summary of the opinion in Escobedo v. Illinois, 378 U.S. 478 (1964), prior to the time appellant entered his guilty plea (RT 91).

APPELLANT'S CONTENTION

Appellant contends that the district court erred in denying the writ because his confession was obtained in violation of the Escobedo rule.

SUMMARY OF RESPONDENT'S ARGUMENT

Appellant's confession was not obtained in violation of the Escobedo rule.

ARGUMENT

APPELLANT'S CONFESSION WAS NOT OBTAINED IN VIOLATION OF THE ESCOBEDO RULE

Appellant's sole contention on this appeal is that his confession was obtained in violation of the rule announced in Escobedo v. Illinois, supra, and that therefore the district court erred in denying him a writ of habeas corpus. In its opinion, the district court explicitly held that Escobedo was not applicable to this case because petitioner had not requested an opportunity to consult with counsel during his interrogation.

We submit that under Johnson v. New Jersey, 384 U.S. 719 (1966), the district court was manifestly right. The following language from Johnson v. New Jersey makes it absolutely clear that a request for counsel is an essential element for the application of the Escobedo rule:

"Apart from its broad implication, the

precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,

'[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect, has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent' 378

U. S., at 490-491.

Because Escobedo is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided.

"As for the standards laid down one week ago in Miranda, if we were persuaded that they

had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of Escobedo, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966." Johnson v. New Jersey, 384 U.S. at 733-734.

CONCLUSION

From the record, it is obvious that petitioner pleaded guilty in the Superior Court because he was confronted with overwhelming evidence of guilt and hoped to obtain a lesser sentence (RT 83). Even if Escobedo were applicable to this case the voluntary nature of appellant's plea, entered upon the advice of experienced and competent counsel would foreclose consideration of this issue on habeas corpus. See Wallace v. Heinze, 351 F.2d 39 (1965). In any event the clear holding of Johnson v. New Jersey completely undercuts petitioner's

had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of Escobedo, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966." Johnson v. New Jersey, 384 U.S. at 733-734.

CONCLUSION

From the record, it is obvious that petitioner pleaded guilty in the Superior Court because he was confronted with overwhelming evidence of guilt and hoped to obtain a lesser sentence (RT 83). Even if Escobedo were applicable to this case the voluntary nature of appellant's plea, entered upon the advice of experienced and competent counsel would foreclose consideration of this issue on habeas corpus. See Wallace v. Heinze, 351 F.2d 39 (1965). In any event the clear holding of Johnson v. New Jersey completely undercuts petitioner's

Escobedo argument, the only argument he had in support of his petition for habeas corpus. Therefore, we respectfully submit that the order denying the writ should be affirmed.

Dated: March 8, 1967

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of the State of California

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Assistant Attorney General

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules, 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: March 8, 1967

ROBERT R. GRANUCCI
Deputy Attorney General

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

TRANSAMERICA CORPORATION, APPELLEE

513 ✓

TRANSAMERICA CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeals from the Judgment of the United States
District Court for the Northern District of California

BRIEF FOR THE UNITED STATES AS APPELLANT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21490

UNITED STATES OF AMERICA, APPELLANT

v.

TRANSAMERICA CORPORATION, APPELLEE

No. 21490-A

TRANSAMERICA CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeals from the Judgment of the United States
District Court for the Northern District of California

BRIEF FOR THE UNITED STATES AS APPELLANT

OPINION BELOW

The memorandum of decision of the District Court
(R. 19-40) is reported at 254 F. Supp. 504.

JURISDICTION

This appeal involves federal income taxes of the taxpayer corporation for the taxable year 1958. The taxes in dispute were paid on December 10, 1962. (R. 3, 9.) A claim for refund was filed by the taxpayer on June 6, 1963, and was rejected by the Commissioner of Internal Revenue on October 22, 1963. (R. 6, 9.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on July 8, 1964, the taxpayer brought this action in the District Court for recovery of the taxes paid. (R. 1-7.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment of the District Court was entered on July 22, 1966. (R. 41-42.) Within sixty days thereafter, on September 16, 1966, a notice of appeal was filed by the United States, and a notice of appeal was filed by the taxpayer on September 19, 1966. (R. 48, 51-52.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether expenses in the total amount of \$176,-046.65, incurred by the taxpayer in connection with the divestiture of its bank holding company business, constitute nondeductible capital expenditures (as the Commissioner determined) or are deductible as ordinary and necessary business expenses (as the District Court held).

STATUTES INVOLVED

The relevant statutes are set out in Appendix A, *infra*.

STATEMENT

The facts material to this appeal as stipulated and found by the District Court (R. 19, 21-23) may be summarized as follows:

Transamerica Corporation (hereinafter referred to as the taxpayer) is a Delaware corporation with its principal place of business in San Francisco, California. It computed its income on the accrual basis of accounting. (R. 12-13.) For several years prior to 1957, the taxpayer controlled through the ownership of capital stock a number of banks, insurance companies, and other businesses. In 1956, Congress enacted the Bank Holding Company Act, c. 240, 70 Stat. 133, which required the taxpayer to consider disposing of either its bank investments or its non-bank investments. The Act provided, in general, that a corporation which was a bank holding company (defined in Section 2 of the Act as a corporation controlling 25% or more of the voting shares of two or more banks) had to dispose of all investments other than bank stocks or, if it did not wish to remain a bank holding company, dispose of all its investments in bank stocks. (R. 13-14, 21.)

The board of directors considered possible courses of action to be taken in view of the Act in their meeting on September 19, 1957. The minutes of the meeting state in part as follows (R. 14; Stip. Ex. E, p. 5):¹

¹ The various exhibits attached to the stipulation have been omitted from the transcript of record by stipulation of the

The Chairman recalled the prior discussions before the Board. Emphasis was placed on the necessity of accomplishing the split-up in a manner which would avoid unnecessary taxes and which would assure the continuity and soundness of the various enterprises both from a management viewpoint and having regard to the capital needs and working funds of the various units. He noted that since the initial consideration of this matter by the Board there had been no material change in the financial condition of the Corporation or the prospects of the various subsidiaries which had altered the initial reaction of the Board that adequate capital and sound management for the non-banking businesses as a whole could only be provided by the continuation of all of the Corporation's non-banking subsidiaries in a single corporate entity. Two pro forma balance sheets as of August 31, 1957, showing the condition of Transamerica if all shares which it owned directly in its majority-owned banks were to be placed in a new bank holding company as well as the financial condition of such a bank holding company were then distributed to the Directors for analysis and comment and the Treasurer was asked to compare these pro forma statements with similar pro forma statements as of April 30, 1957, which had been furnished at the June meeting of the Directors. It was generally agreed that the least

parties, but may be referred to as if set out therein. (R. 61-62.)

Four reproduced copies of the exhibits relied upon by the Government will be supplied to the Clerk and a copy will be mailed to opposing counsel.

disruption of the Corporation's existing business and the maximum realization and utilization of the underlying values in the subsidiaries would be achieved by a transfer of the shares of the majority-owned banks (directly owned by the Corporation) to a separate corporation, the shares of which would be spun off to Transamerica's stockholders, with all of the remaining assets of the Corporation retained by the continuing Transamerica Corporation. After again discussing the advisability of attempting to effect a recapitalization of the Corporation with a view to reducing the number of shares outstanding prior to the spin off, it appeared from the general discussion that in view of the large number of stockholders who hold only a half share of Transamerica Corporation stock or whose holdings include a half share or whose holdings were for a small number of shares and other factors, such a recapitalization would aggravate the present stockholders of the Corporation and would be impractical.

The Board then again reviewed the advantages and disadvantages of each form of reorganization possible under the Act. Following this discussion, it was the unanimous conclusion of the Directors present that the ownership of the directly-owned shares of the majority-owned banks by a single corporate entity, which would be newly created for this purpose and the shares of which would be spun off to Transamerica's stockholders, was highly desirable, and that various corporate, management and fiscal considerations made it equally desirable for Transamerica as a single corporate entity to retain all of the non-banking businesses.

The details of a proposed plan were discussed and the board approved a plan of reorganization whereby Transamerica would cease to be a bank holding company by transferring all of its bank stock to a new corporation to be organized for that purpose and to be called Firstamerica Corporation (hereinafter referred to as Firstamerica). The taxpayer would receive in exchange for its bank stock all of the capital stock of Firstamerica. Immediately after the exchange, and as a part of the plan of reorganization, the taxpayer was to distribute the Firstamerica stock to the taxpayer's own stockholders. (R. 13-14, 21.) The "PLAN OF REORGANIZATION" approved by the board (Stip. Ex. E, pp. 8-10) is set out in Appendix C, *infra*.

The taxpayer then obtained rulings from the Commissioner of Internal Revenue regarding the tax effect of the reorganization on itself, on Firstamerica, and on the stockholders of the two corporations. (R. 14; Stip. Ex. F.)

The taxpayer's stockholders were advised of the details, purpose and effect of the plan of reorganization by a notice of annual meeting and proxy statement. (R. 14-15; Stip. Ex. H.) In his letter forwarding the notice and proxy statement, the president of the taxpayer noted (Stip. Ex. H, first and second unnumbered pages):

In essence, this plan contemplates that Transamerica will continue to own and manage its insurance and other non-banking businesses, but will cease to be a bank holding company. To accomplish this, it will transfer to Firstamerica

Corporation, a new corporation organized for this purpose, all of its directly held shares in its majority-owned banks together with \$20,000,000 in cash. In exchange for these stocks and cash, Transamerica will acquire all of the stock of Firstamerica, consisting of 11,372,022 shares, and these shares will then be distributed share for share to our stockholders. The Firstamerica shares will be mailed to you as promptly as possible after June 30, 1958, the planned date of the reorganization. Application will be made to list the Firstamerica stock on the Pacific Coast and New York Stock Exchanges.

Stockholders will not be required to surrender any of their Transamerica stock. After the proposed reorganization, you will hold both your Transamerica shares and an equal number of shares of the stock of Firstamerica Corporation. The market values of the Transamerica and Firstamerica shares at that time will, of course, reflect the fact that the present assets of Transamerica have been divided between the two corporations. [Emphasis in original.]

* * * *

In the opinion of your Board, this plan constitutes the best possible method of preserving the values underlying your Transamerica stock while meeting the legal requirements of the situation. We firmly believe that, from the standpoint of continuity and of providing adequately for the management, capital and working fund needs of our present subsidiaries, both banking and non-banking, the proposed plan is far preferential to any other method of compliance.

The proxy statement stated (R. 22; Stip. Ex. H, p. 3):

Immediately after the distribution, the stockholders of Transamerica will be the owners of two corporations, which will own the same assets owned by Transamerica immediately prior to the distribution. The two corporations will be Transamerica Corporation and Firstamerica Corporation, which has been organized to receive the property proposed to be transferred under the plan.

It went on to state (Stip. Ex. H, p. 5):

Based on the equity values as of December 31, 1957 of the assets to be retained by Transamerica and those to be transferred to Firstamerica, the reorganization will result in a roughly equal division of Transamerica's present assets. However, Firstamerica proposes to record the assets transferred to it in its accounts at the book values at which the assets are stated in the Transamerica accounts.

The plan of reorganization contemplates that all paid-in surplus of Transamerica will be allocated to Firstamerica, and that the earned surplus of Transamerica will be divided between the two corporations in proportion to the equity value of the net assets of the respective corporations, with such adjustment of the earned surplus allocation as may be necessary to bring the total allocation of paid-in and earned surplus into agreement with the book value of the assets transferred. The amount of the adjustment so required as of December 31, 1957 would have been \$1,560,308. The paid-in surplus allocated

to Firstamerica will be transferred to Firstamerica's capital stock account to the extent of the par value of the capital stock to be issued by Firstamerica, and the balance will remain as paid-in surplus.

The proxy statement set out a summary of the balance sheet for the taxpayer as of December 31, 1957, and pro forma balance sheets of the taxpayer and Firstamerica as they would have appeared if the proposed reorganization had been effected as of that date. These balance sheets, further summarized and using book values, read as follows (Stip. Ex. H, p. 6) :

BALANCE SHEET OF TRANSAMERICA (December 31, 1957)		PRO FORMA BALANCE SHEETS	
ASSETS		TRANSAMERICA	FIRSTAMERICA
Bank stocks	\$148,524,203		\$148,524,203
Non-bank stocks	50,363,233	\$ 50,363,233	
Other securities	12,056,526	12,056,526	
Cash and other receivables	40,000,704	40,000,704	
Total:	<u>\$250,944,666</u>	<u>\$102,420,463</u>	<u>\$148,524,203</u>
Cash to be transferred from Transamerica to Firstamerica		(20,000,000)	20,000,000
Total:	<u>\$250,944,666</u>	<u>\$ 82,420,463</u>	<u>\$168,524,203</u>
LIABILITIES			
Total liabilities:	\$ 9,975,410	\$ 9,975,410	
CAPITAL			
Capital stock, \$2 par value	\$ 22,744,044	\$ 22,744,044	\$ 22,744,044
Paid-in surplus	117,364,957		94,620,913
Earned surplus	100,860,255	51,261,317	49,598,938
Adjustment of earned surplus		(1,560,308)	1,560,308
Total:	<u>\$240,969,256</u>	<u>\$ 72,445,053</u>	<u>\$168,524,203</u>
Total Liabilities and Capital:	\$250,944,666	82,420,463	\$168,524,203

The proxy statement indicated that the reorganization would reduce the book value (net assets per share of outstanding stock) of the taxpayer's stock from \$21.19 per share to \$6.37 per share and give Firstamerica's stock a book value of \$14.82 per share. (R. 22; Stip. Ex. H, p. 6.)

The plan of reorganization was approved by the stockholders at their April 1958 meeting. (R. 14; Stip. Ex. G.) Thereafter bank stocks having a book value of \$148,319,593 and \$20,000,000 in cash were transferred to Firstamerica in exchange for all of the stock of the latter corporation (i.e., 11,372,022 shares, a number equal to the number of shares of Transamerica stock then outstanding). Firstamerica stock was immediately thereafter distributed to the taxpayer's stockholders on the basis of one share of Firstamerica stock to each share of Transamerica stock. The reorganization was completed by July 1958. (R. 15, 22; Stip. Ex. I, p. 2.)

No outstanding shares of Transamerica stock were redeemed or transferred and no additional shares of that stock were issued in connection with the reorganization. No change was made in the corporate charter or in the capital stock structure. The taxpayer did not acquire any money or other tangible assets or improve any such assets. The number of Transamerica shares outstanding and the par value thereof remained the same. (R. 15, 21-22.) However, the taxpayer's paid-in surplus of \$117,364,957 was eliminated as a result of the reorganization and became the capital stock and paid-in surplus of First-

america. The taxpayer's 1958 annual report to its stockholders recorded this change as follows (Stip. Ex. I, p. 2) :

On June 30, 1958 the carrying value of the Corporation's directly held shares in its majority-owned banks was \$148,319,593. The transfer of these assets and \$20,000,000 in cash to Firstamerica reduced Transamerica Corporation's assets by \$168,319,593, which reduction was offset by the allocation to Firstamerica of all of the Corporation's Paid-in Surplus of \$117,364,957 as well as \$50,954,636 of its Earned Surplus.

The net effect of the plan of reorganization was summed up in the taxpayer's 1958 annual report as follows (Ex. I, p. 1) :

Our stockholders thus became the owners of two corporations—Transamerica Corporation and Firstamerica Corporation—which together owned precisely the same assets that had been owned by Transamerica immediately before the distribution. The only change was that their equities were evidenced by certificates of stock of two corporations instead of one. Thus the reorganization left intact our stockholders' interests in the substantial values underlying all of the Corporation's investments.

In carrying out its plan of reorganization in 1958, the taxpayer incurred the following obligations (R. 15-16) :

Fees and costs paid to transfer agent for mailing Firstamerica stock certificates to the taxpayer's stockholders	\$ 76,050.94
Insurance on Firstamerica stock certificates mailed to the taxpayer's stockholders	8,158.99
Attorney fees for:	
Services in obtaining tax ruling	13,500.00
Services in formulating the reorganization plan, processing the plan through the Federal Reserve Board, development of agendas and programming the steps necessary to carry out the plan, and preparation of proxy statement	30,500.00
Printing costs of proxy statement sent to stockholders of the taxpayer	33,432.52
Federal documentary stamp taxes on the transfer by the taxpayer of the Firstamerica stock to its shareholders	14,404.20
Total:	<u>\$176,046.65</u>

Expenses incurred by Firstamerica in connection with the plan of reorganization are not included in this itemization. (R. 16.)²

² The District Court's finding that (R. 23) "None of the claimed expenses relate to the organization of Firstamerica Company [*sic*] or to its corporate charter, capital structure or issuance of its stock" inaccurately reflects the record facts. The tax rulings considered the tax consequences of the reorganization on Firstamerica, the proxy statement deals with the organization of Firstamerica, and the plan of reorganization itself deals with both. Thus, a portion of the legal expenses incurred in obtaining the tax rulings and in developing and processing the plan of reorganization, as well as part of the cost of the proxy statement, in fact "relate to the organization of Firstamerica."

The taxpayer filed a consolidated income tax return for the calendar year 1958 which reflected the income and deductions of its affiliated corporations. (R. 12-13.) Included among the deductions claimed on that return were the expenses listed above, except that a deduction was claimed for the \$14,404.20 incurred for documentary stamp taxes on the taxpayer's 1959 return. (R. 16.)

The Internal Revenue Service audited the 1958 consolidated tax return and disallowed the taxpayer's expenses in the amount of \$161,642.45. (R. 13; Stip. Exs. A-C.) The Service also audited the taxpayer's 1959 return and disallowed the \$14,404.20 incurred for documentary stamp taxes on that return, an obligation, if deductible, deductible only in 1958. (R. 13, 16.) The taxpayer filed a claim for refund for 1958 which the Service denied, and this action for refund was then instituted. (R. 13.)

In the District Court, the taxpayer contended that the dominant aspect of the transaction was a partial liquidation of its bank investments in order to comply with the Bank Holding Company Act and that the expenses incurred were consequently deductible as ordinary and necessary business expenses. (R. 23.) The Government, on the other hand, contended that the dominant purpose of the transaction was a reorganization which benefited the future operations of the taxpayer and consequently that the expenditures made in accomplishing it were nondeductible capital expenditures. (R. 23-24.)

The District Court held that the transaction was a partial liquidation and that the expenses were deduct-

ible as ordinary and necessary business expenses (R. 21-37), and it entered judgment for the taxpayer (R. 41-42). From that action, the Government has filed and prosecuted the instant appeal. (R. 48, 57.)³

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding and concluding that the taxpayer was entitled to deduct as an ordinary and necessary business expense amounts totalling \$176,046.65 which it incurred in 1958 in connection with the divestiture of its bank holding company business.

2. The District Court erred in failing to find and conclude that such amounts constituted nondeductible capital expenditures.

SUMMARY OF ARGUMENT

The taxpayer incurred expenses in divesting itself of its bank stock in order to comply with the provisions of the Bank Holding Company Act of 1956. The Act adopted the policy that holding companies

³ Two other issues were presented to the District Court: (1) whether the deductibility of the documentary stamp taxes was properly raised in view of the taxpayer's failure to include it in its claim for refund. (R. 36-37, 43-44); and (2) whether an affiliate of the taxpayer (General Metals Corporation) was entitled to a deduction for money paid and property transferred to the City of Oakland either as a charitable contribution or as a business expense (R. 37-40, 44). The Government has not appealed from the District Court's adverse ruling on the first issue. The taxpayer has appealed from the ruling on the second issue (R. 46, 53-54) which will be discussed in the reply and answering brief to be filed herein by the Government.

owning bank stock should not have interests in other businesses having no close relationship to banks. The taxpayer, having interests in banks and other businesses, elected to become a non-bank holding company and adopted a plan of reorganization whereby it would (1) transfer its bank stock to a corporation organized for that purpose (Firstamerica) in exchange for all of its stock and (2) distribute to its (taxpayer's) shareholders all of the Firstamerica stock. As a result of the reorganization, the taxpayer's former businesses, now vested in itself and Firstamerica, continued to operate—in compliance with the Act. The transaction was tax-free since Congress specially provided (in Sections 1101-1103 of the Internal Revenue Code) for non-recognition of gain in respect to such divestiture transactions.

In holding that the expenses incurred by the taxpayer were deductible as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954, the District Court erroneously held that the transaction was essentially a partial liquidation in which it gained no advantage which accrued to the benefit of its future operations. Under the well-established rule that costs of reorganization or recapitalization are nondeductible capital expenditures, these expenditures are not deductible. The transaction, viewed as a whole, was a reorganization. There was a substantial alteration of the taxpayer's business which accrued to the benefit of its future operations as a holding company and there was a substantial impact on its capital accounts. Moreover, even if viewed as a partial liqui-

dation, the essential purpose of the liquidation was compliance with the Act so that the bank business could continue, not termination and liquidation of the bank operation. Consequently, the expenses were capital in nature, benefiting the future operation of the business for an indefinite period of years, not deductible offsets to current operating income.

ARGUMENT

The District Court Erred in Allowing Transamerica to Deduct as Ordinary and Necessary Business Expenses Amounts Incurred in Connection With the Divestment of Its Bank Investments in Compliance With the Bank Holding Company Act of 1956

Section 162(a) of the Internal Revenue Code of 1954, Appendix A, *infra*, provides a deduction against ordinary income for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *." This statutory language refers to the recurrent, regular costs of doing business—i.e., the expenses which produce the year's income without detracting from the assets of the business—as distinguished from those expenditures which create assets or secure benefits or advantages which have a useful life extending beyond the year in which incurred. The latter amounts are not deductible business expenses for the purposes of Section 162(a), but are capital in nature and cannot be deducted as an expense of the year in which they were incurred. *Welch v. Helvering*, 290 U.S. 111, 113-116; *Commissioner v. Tellier*, 383 U.S. 687, 689-690; *United States v. Akin*, 248 F. 2d 742, 744 (C. A. 10), certiorari denied, 355 U.S. 956. Cf. Section 263,

Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 263).

In this case, the taxpayer incurred expenses in divesting itself of its bank investments in order to comply with the Bank Holding Company Act of 1956, c. 240, 70 Stat. 133, Sections 2-9 (12 U.S.C. 1964 ed., Secs. 1841-1848) (hereinafter sometimes referred to as the Act). The taxpayer accomplished the divestiture by transferring its bank investments to a newly organized corporation in return for all of that corporation's stock and then distributing the stock to its shareholders. (R. 13-15.) This transaction was a reorganization whereby the taxpayer separated its business into banking and nonbanking assets to comply with the Act without altering the substance of its shareholders' interest in them.

In holding that the expenses of divestiture were deductible under Section 162(a) as business expenses, the District Court concluded that they were incurred in a partial liquidation which was accompanied by little or no change in its corporate structure which accrued to the benefit of its future operations. (R. 32-33, 35-36.) This decision ignores the real purpose and effect of the transaction—reorganization to comply with the Act and thereby continue in business. The transaction was a reorganization—the shareholders' interest in the equity values of the assets of the taxpayer did not change—and the expenses consequently are capital expenditures. Moreover, even if the transaction were considered to be a partial liquidation, the expenses incurred still constitute nondeductible capital expenditures because the dominant

purpose of the transaction was to effect a continuation of the business in compliance with the Act, rather than a termination of any shareholders' interest in the assets.⁴

A. *The Bank Holding Company Act*

As a corporation holding substantial investments in banks, insurance companies, and other businesses (Stip. Ex. H, p. 6; Plan of Reorganization, Stip. Ex. E, pp. 8-10, Appendix C, *infra*), the taxpayer was immediately affected by the enactment of the Bank Holding Company Act of 1956. Adopting the policy that holding companies with bank interests ought to confine their activities to the management and control of banks and not engage in the management and control of businesses having no close relationship to banking, the Act made it unlawful for a bank holding company (i.e., a corporation controlling 25 percent or more of the voting stock of two or more banks) to retain control of any voting stock of any company which was not a bank or bank holding company, or to engage in any business other than that of banking. Sections 2 and 4, Bank Holding Company Act of 1956, *supra* (12 U.S.C. 1964 ed., Secs. 1841, 1843); S. Rep. No. 1095, 84th Cong., 1st Sess., pp. 11-14 (2 U. S. C. Cong. & Adm. News (1956) 2482, 2493-

⁴ The fact that the expenditures were made to comply with federal law does not alter the test; the question remains whether or not the expenditures were for a benefit or advantage having a life extending beyond the year in which they were incurred. *Woolrich Woolen Mills v. United States*, 289 F. 2d 444 (C.A. 3d); *RKO Theatres, Inc. v. United States*, 163 F. Supp. 589 (Ct. Cl.).

2495). Section 8 of the Act (12 U.S.C. 1964 ed., Sec. 1847) provides that any company which willfully violates any provision of the Act shall be subject to a fine of not more than \$1,000 for each day during which the violation continues; any individual who willfully participates in a violation of the Act is subject to fine of not more than \$10,000 or imprisonment for not more than one year, or both.

To comply with the Act, companies holding both bank and non-bank investments had to elect to become purely bank holding companies and divest themselves of their nonbanking investments, or divest themselves of their banking interests and so become non-bank holding companies. The separation could be accomplished either by distributing the bank investments directly to the holding company's shareholders, or by transferring them to a corporation organized for that purpose in return for the stock of the subsidiary and then immediately distributing that stock to the shareholders. S. Rep. No. 1095, *supra*, p. 16 (2 U.S.C. Cong. & Adm. News (1956) 2482, 2497). Congress amended the 1954 Code to provide elaborate measures for tax relief for holding companies making distributions in order to comply with the Act. Sections 1101-1103, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 1101-1103), added by Section 10 of the Act. Shareholders of a corporation electing to become a nonbank holding company recognize no gain on the distribution to them of bank stock or of stock in a new subsidiary corporation organized to acquire the bank assets in question. Section 1101(b). Generally, the distributing corporation recognizes no

gain or loss on the transaction, and the new corporation organized to receive the bank assets recognizes no gain or loss on the transfer of the assets to it. Section 351; Section 368, Appendix A, *infra*; S. Rep. No. 1095, *supra*, pp. 16-18 (2 U.S.C. Cong. & Adm. News (1956) 2482, 2497-2500. The Act made no special provision for allowance of the type of deductions claimed here.

Electing to divest itself of its bank stock, the taxpayer adopted a plan of reorganization whereby (1) a new corporation would be organized and the bank stock transferred to it in exchange for all of its stock, and (2) the taxpayer would immediately distribute all of the stock of the subsidiary to its (taxpayer's) stockholders.⁵ This plan was carried out. First-america Corporation was organized and, on or about June 30, 1958, the taxpayer transferred its bank stocks, having a book value of \$148,000,000 and \$20,000,000 in cash to Firstamerica and immediately, in compliance with the Act, distributed the First-america stock received in exchange for the bank stock and cash to its stockholders. (Stip. Ex. I, pp. 1-2.) The effect of the transaction, utilizing December 31, 1957, book values, may be summarized as follows (Stip. Ex. H, p. 6):

⁵ S. Rep. No. 1095, 84th Cong., 1st Sess., p. 17 (2 U.S.C. Cong.&Adm. News (1956) 2482, 2499) (nonrecognition treatment is available where the bank stock "is first transferred to a wholly owned subsidiary expressly created for that purpose and the stock of the subsidiary is then immediately distributed to the shareholders of the parent").

BALANCE SHEET OF TRANSAMERICA (December 31, 1957)		PRO FORMA BALANCE SHEETS	
<u>ASSETS</u>		<u>TRANSAMERICA</u>	<u>FIRSTAMERICA</u>
Bank stocks	\$148,524,203	\$148,524,203
Cash and other investments	102,420,463	\$102,420,463
Cash to be transferred to Firstamerica	(20,000,000)	20,000,000
	<u>\$250,944,666</u>	<u>\$ 82,420,463</u>	<u>\$168,524,203</u>
<u>LIABILITIES</u>	\$ 9,975,410	\$ 9,975,410
<u>CAPITAL</u>			
Capital stock	\$ 22,744,044	\$ 22,744,044	\$ 22,744,044
Paid-in surplus	117,364,957	94,620,913
Earned surplus	100,860,255	51,261,317	49,598,938
Adjustment of earned surplus	(1,560,308)	1,560,308
Total:	<u>\$240,969,256</u>	<u>\$ 72,445,053</u>	<u>\$168,524,203</u>

The reorganization in fact eliminated the taxpayer's paid-in surplus of more than \$117,000,000 and reduced its earned surplus from about \$100,000,000 to about \$51,000,000. (R. 22; Stip. Ex. I, p. 2.)

As a result of the reorganization, the taxpayer's stockholders retained the same equity in the business as before, but the investments were now divided between the two corporations in such a way that the business could continue, now being in compliance with the Bank Holding Company Act. The taxpayer's 1958 annual report to its stockholders summed it up as follows (Stip. Ex. I, p. 1) :

Our stockholders thus became the owners of two corporations—Transamerica Corporation and Firstamerica Corporation—which together owned precisely the same assets that had been owned by Transamerica immediately before the distribution. The only change was that their equities were evidenced by certificates of stock of two corporations instead of one. Thus the reorganization left intact our stockholders' interests in the substantial value underlying all of the Corporation's investments.

B. The expenses of divestiture are not deductible

In carrying out the plan of reorganization, the taxpayer incurred expenditures totalling \$176,046.65 for (1) transfer agent fees, (2) insurance on Firstamerica stock certificates while being mailed to Transamerica stockholders, (3) attorney fees for services in obtaining tax rulings and in formulating and processing the plan of reorganization, preparing for its performance, and preparation of the proxy statement,

(4) printing costs for the proxy statement, and (5) federal documentary stamp taxes on the transfer by Transamerica of the Firstamerica stock to its stockholders. (R. 15-16.) The District Court erred in holding that these expenditures are deductible as business expenses under Section 162(a), because they represent nondeductible capital expenditures of either (1) a reorganization, or (2) a partial liquidation whose principal purpose was a readjustment, not a termination, of the taxpayer's business in order to comply with the Act and thereby continue in business.

1. *Reorganization*

It is well established that expenses incurred in reorganizing a corporation constitute nondeductible capital expenditures. The rule is based on the principle that the corporation has acquired a benefit or advantage which, like organizational expenses, benefits the corporation in its future operations for an indefinite period.⁶ It is not necessary that the reor-

⁶ Regarding the nondeductibility of reorganization expenses, see *Motion Picture Capital Corp. v. Commissioner*, 80 F. 2d 872 (C.A. 2d); *Skenandoa Rayon Corp. v. Commissioner*, 122 F. 2d 268, 271 (C.A. 2d), certiorari denied, 314 U.S. 696; *Missouri-Kansas Pipe Line Co. v. Commissioner*, 148 F. 2d 460, 462 (C.A. 3d); *International Building Co. v. United States*, 199 F. 2d 12, 26 (C.A. 8th), reversed on other grounds, 345 U.S. 502; *Odorono Co. v. Commissioner*, 26 B.T.A. 1355.

Organizational expenses are capital expenditures. *Guarantee Bond & Mortgage Co. v. Commissioner*, 44 F. 2d 297 (C.A. 6th). Since 1954, certain organizational expenses may be amortized over a five-year period. Section 248, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 248); Section 1.248-1, Treasury Regulations on Income Tax (1954 Code) (26 C.F.R., Sec. 1.248-1).

ganization concern the corporate structure of the taxpayer-corporation (*Missouri-Kansas Pipe Line Co. v. Commissioner*, 148 F. 2d 460 (C. A. 3d)) (expenses of distributing subscription warrants for subsidiary's stock are not deductible), or even that some tangible asset be acquired (*General Bancshares Corp. v. Commissioner*, 326 F. 2d 712, 716 (C. A. 8th), certiorari denied, 379 U.S. 832) (expenses of issuing stock dividends are not deductible).

That the transaction in this case was a reorganization and was so regarded by all is evident from the minutes of the board of directors when the plan was adopted (Stip. Ex. E, pp. 8-10, Appendix C, *infra*), the proxy statement (Stip. Ex. H, pp. 1-7), the minutes of the shareholders' meeting when the plan was approved (Stip. Ex. G, pp. 2-7), and the 1958 annual report (Stip. Ex. I, pp. 1-2). The transaction effectively rearranged the taxpayer's businesses, separating the banking and nonbanking parts so that they could be pursued in compliance with the Bank Holding Company Act, but not altering the substance of the shareholders' equity in them. Indeed, the sole change from their standpoint was that their equity interest was evidenced after the transaction by two pieces of paper (stock certificates) instead of one. (Stip. Ex. I, p. 1.) The transaction did in fact alter the taxpayer's corporate structure; it eliminated the bank investments which would have prevented it from continuing to do business as a holding company. Finally it had a dramatic impact on the taxpayer's capital structure by eliminating paid-in surplus of

more than \$117,000,000 and reducing earned surplus by \$49,000,000. (R. 22; Stip. Ex. I, p. 2.)

Although the taxpayer itself consistently referred to the divestiture transaction as a "reorganization", it safely may be predicted that the taxpayer will contend that it was not a "reorganization" within the meaning of the Internal Revenue Code. Section 368 (a) (1) (D) includes in the definition of a "reorganization" the transfer by a corporation of part of its assets to another corporation if, immediately after the transfer, the transferor or its stockholders are in control of the corporation to which the assets have been transferred, provided further that the stock of the corporation receiving the assets is distributed in a transaction qualifying under Section 354, Section 355, or Section 356 of the 1954 Code. Admittedly, there are technical difficulties in threading the facts of this case through that particular needle, but the point to be stressed is that the transaction here involved was made tax-free under a specially tailored set of provisions (Sections 1101-1103.) The latter, like the general reorganization provisions of the Code, reflect Congressional policy that when the same people continue to own the same businesses in different corporate forms, there is no sound basis for attaching tax consequences to the changeover. Viewed in that light, it should make no difference whether the "reorganization" qualifies for non-recognition treatment under Section 368(a) (1) (D) as well as under Sections 1101-1103. If that much be accepted, then the judicial decisions on the question of whether "reorganization" expense is a currently deductible item are fully applicable here.

Following along the same line, it may be observed that the District Court unwarrantedly concerned itself with searching out some benefit to the taxpayer stemming from the reorganization. As an elementary proposition, corporate officers do not authorize outlays of cash which neither benefit nor are intended to benefit the corporation—if they do, the minimum requirement for deductibility of ordinary and necessary business expenses under Section 162(a) remains unsatisfied. *Welch v. Helvering*, 290 U. S. 111. In any event, however, it seems unwise to insist upon an objective showing that the taxpayer acquired something in the nature of a new valuable asset by reason of the expenditures here involved. In many corporate “reorganizations” of more conventional stripe, particularly those involving corporate divisions, the primary corporation may wind up with diminished assets, but the assumption to be made is that the transaction was of advantage either to the corporation or to its shareholders or it would not have been made. All of the foregoing reduces itself to the simple proposition that the expenditures here in dispute either produced (or were intended to produce) a benefit to the taxpayer or they could not possibly qualify for deduction under Section 162(a). The only question which remains is whether the expenses of producing such benefit extend into the future for an indefinite period of years. In the case at bar, it clearly appears that the “reorganization” expenses here involved related to a permanent change in the structure of the taxpayer’s business, and that, like

“reorganization” items generally, they should be capitalized and not deducted.

2. *Partial liquidation*

In treating this case as one involving a partial liquidation, the District Court looked at one facet of the transaction and ignored the whole, but, even if viewed as a partial liquidation, deduction of the expenses in question should have been disallowed. As the District Court correctly noted (R. 32-33), the test of deductibility in partial liquidation cases is whether or not the substance of the transaction in which the expenditures were incurred was to benefit the future operations of the corporation. Thus, in *Mills Estate v. Commissioner*, 206 F. 2d 244 (C. A. 2d), a corporation holding both real estate and stock investments had decided to terminate its real estate business and had disposed of its real estate. It then became subject to the personal holding company tax and, in order to reduce its taxes, it distributed the proceeds received from the disposition of the real estate. It then reduced its authorized capital stock in order to comply with state law. The Second Circuit, considering the deductibility of attorney fees incurred in distributing the cash proceeds and in altering the capital structure, held that the transaction should be viewed as a whole and the expenses incurred analyzed in respect to the operation of the business. In concluding that the expenses were non-deductible capital expenditures, the court reasoned as follows (206 F. 2d, p. 246):

This taxpayer, having decided to go out of the real estate operation part of its business and having turned its real estate into cash, underwent a recapitalization to give itself the capital structure it determined was best suited to carrying on that part of the business it was to continue. The services for which the attorneys were paid were all necessary steps to attain that end. What occurred was essentially a reorganization—a change in the corporate structure for the benefit of future operations—and the expenses of that sort of a corporate change are not deductible as ordinary and necessary expenses in carrying on a trade or business. * * * [Citations omitted.] They are instead a part of the expenditure needed to give the corporation an intangible asset which we may call its altered corporate structure; and, as were the costs of its original organization, these expenditures were capital in nature.

And see *Farmers Union Corp. v. Commissioner*, 300 F. 2d 197, 200 (C. A. 9th) (“Expenses incurred for the purpose of changing the corporate structure for the benefit of future operations are not ordinary and necessary businesses expenses”).

On the other hand, where the principal concern was to retire one of the stockholders, the Eighth Circuit has held that the essence of a transaction whereby the corporation distributed part of its assets to the stockholder in return for his stock was a partial liquidation, not an improvement benefiting the future of the business. Consequently, it held that the costs incurred in the redemption and distribution were de-

ductible business expenses. *Gravois Planing Mill Co. v. Commissioner*, 299 F. 2d 199.

This case is governed by the principle adopted in the *Mills Estate* case—i.e., that the expenses were incurred in an effort to enable the taxpayer's shareholders to preserve their interests in the entire business operated by the taxpayer. The record facts yield but one inference—that the taxpayer divested itself of its bank business and thrust it into Firstamerica in order that its shareholders might continue to enjoy the benefits accruing to them from the operation of the bank and non-bank business. The divestiture was not connected with a termination of part of the shareholders' interest in the assets. Unlike the *Gravois Planing Mill* case, *supra*, the shareholders were not terminating their investment in the business. Instead, the whole purpose of the transaction was to continue the business and the expenditures are, consequently, not deductible.

In analyzing the case, the District Court considered the consequences of the situation if the taxpayer had sold the bank assets for cash and distributed the proceeds to its shareholders, or had distributed the bank assets in kind, and reasoned that in such cases the taxpayer would have been entitled to deduct the cost of making the distribution. (R. 31.) However, it is not clear that a deduction would be allowed in such cases. If the bank assets were distributed to comply with the Bank Holding Company Act and not to terminate the business, then, as here, the expenses should be capitalized. See *Mills Estate v. Commissioner*, *supra*; *Farmers Union Corp. v. Commissioner*,

supra. Moreover, in cases where a cash dividend is distributed, there is, unlike here, no question of the continuation of the business of the taxpayer and of the maintenance of the shareholders' undiminished equity interest in the business.

CONCLUSION

For the foregoing reasons, the judgment of the District Court holding that the expenses of divestiture were deductible business expenses should be reversed.

Respectfully submitted,

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RICHARD L. CARICO,
Assistant United States Attorney.

APRIL, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: This day of April, 1967.

J. EDWARD SHILLINGBURG

APPENDIX A

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.* There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 355. DISTRIBUTION OF STOCK AND SECURITIES OF A CONTROLLED CORPORATION.

(a) *Effect on Distributees.*—

(1) *General rule.*—If—

(A) a corporation (referred to in this section as the “distributing corporation”)—

(i) distributes to a shareholder, with respect to its stock, or

* * * *

solely stock or securities of a corporation (referred to in this section as “controlled corporation”) which it controls immediately before the distribution,

(B) the transaction was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both (but the mere fact that subsequent to the distribution stock or securities in one or more of such corporations are sold or exchanged by all or some of the distributees (other than pursuant to an arrangement

negotiated or agreed upon prior to such distribution) shall not be construed to mean that the transaction was used principally as such a device),

(C) the requirements of subsection (b) (relating to active businesses) are satisfied, and

(D) as part of the distribution, the distributing corporation distributes—

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or

* * * *

then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder or security holder on the receipt of such stock or securities.

* * * *

(26 U.S.C. 1964 ed., Sec. 355.)

SEC. 368. DEFINITIONS RELATING TO CORPORATE REORGANIZATIONS.

(a) *Reorganization*.—

(1) *In general*.—For purposes of parts I and II and this part, the term “reorganization” means—

* * * *

(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination there-

of, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;

* * * *

(26 U.S.C. 1964 ed., Sec. 368.)

APPENDIX B

STATEMENT IN COMPLIANCE WITH RULE 18
REGARDING EXHIBITS

The only exhibits in the record are Exhibits A through L attached to the stipulation of facts. (R. 11-18.) Pursuant to the stipulation of the parties herein, they have not been duplicated. (R. 61-62.)

APPENDIX C

Regular Meeting of the Board of Directors of Transamerica Corporation, San Francisco, California, September 19, 1957 (Stip. Ex. E., pp. 8-10):

PLAN OF REORGANIZATION

"Transamerica Corporation (hereinafter referred to as Transamerica) will cease to be a bank holding company, but will continue to own and manage its insurance and other non-banking businesses. To this end, it will take the following steps:

(1) Transamerica will organize under Delaware law a new corporation to be known as Firstamerica Corporation (hereinafter referred to as Firstamerica) which will function as a registered bank holding company. Firstamerica will be authorized by its charter to engage in the business of managing and controlling banks and of furnishing services to or performing services for its subsidiary banks. Its home office and principal place of business will be in San Francisco, California. Its charter will authorize the issuance of a single class of common stock with a par value of \$2.00 per share in an amount of 25,000,000 shares, and Firstamerica will initially issue and have outstanding an amount equal to the number of shares of Transamerica outstanding, as further described below.

(2) Preliminary to an exchange of properties between Transamerica and Firstamerica, each of Transamerica's majority-owned banking subsidiaries (other than the First National Bank of Arizona) which now owns or controls more than 5% of the stock of any non-banking company, or which in any other manner controls any non-banking company, will liquidate,

transfer, or reduce to 5% or less its control or ownership of, each of these non-banking companies. No such action shall be taken with respect to the shares of the First Bank Building Corporation now owned and controlled by the First National Bank of Arizona.

(3) Transamerica will thereafter transfer to Firstamerica \$20,000,000 in cash and all of the stock it directly holds in each of its majority-owned banking subsidiaries. Based on Transamerica's ownership of such stock as of September 20, 1957, Firstamerica will own immediately after the transfer the following bank stocks:

Bank	Total Shares Outstanding	Transferred to Firstamerica	
		Shares	Per Cent Outstand Shares
First Western Bank and Trust Company	2,213,942	1,622,431	73.2
First National Bank of Portland, The	1,600,000	941,044	58.8
Walker Bank & Trust Company	189,468	171,557	90.5
National Bank of Washington	358,625	200,824	55.9
Bank of Idaho	135,000	133,430	98.8
First National Bank of Nevada	500,000	480,719	96.1
Bank of Nevada	9,000	6,593	73.2
First National Bank of Arizona	920,000	537,540	58.4
Southern Arizona Bank and Trust Company	250,000	231,325	92.5

	Total Shares Outstanding	Transferred to Firstamerica	
		Shares	Per Cent of Outstanding Shares
an National Bank			
enver, The	20,000	18,988	94.9400
ood State Bank	22,500	21,650	96.2222
ational Bank in			
Collins, The	2,500	2,252	90.0800
f New Mexico	45,000	41,165	91.4778
tate Bank at			
p	1,500	1,373	91.5333
ounty State Bank	19,200	12,744	66.3750
l State Bank	18,000	9,630	53.5000
te National Bank	16,000	12,258	76.6125
f Glacier County	1,500	1,305	87.0000
National Bank			
alispell, The	40,000	35,725	89.3125
a Bank	4,000	3,639	90.9750
National Bank,			
	35,000	32,483	92.8086
ational Bank			
ramie, The	1,000	930	93.0000
ational Bank			
verton, The	5,500	5,050	91.8182

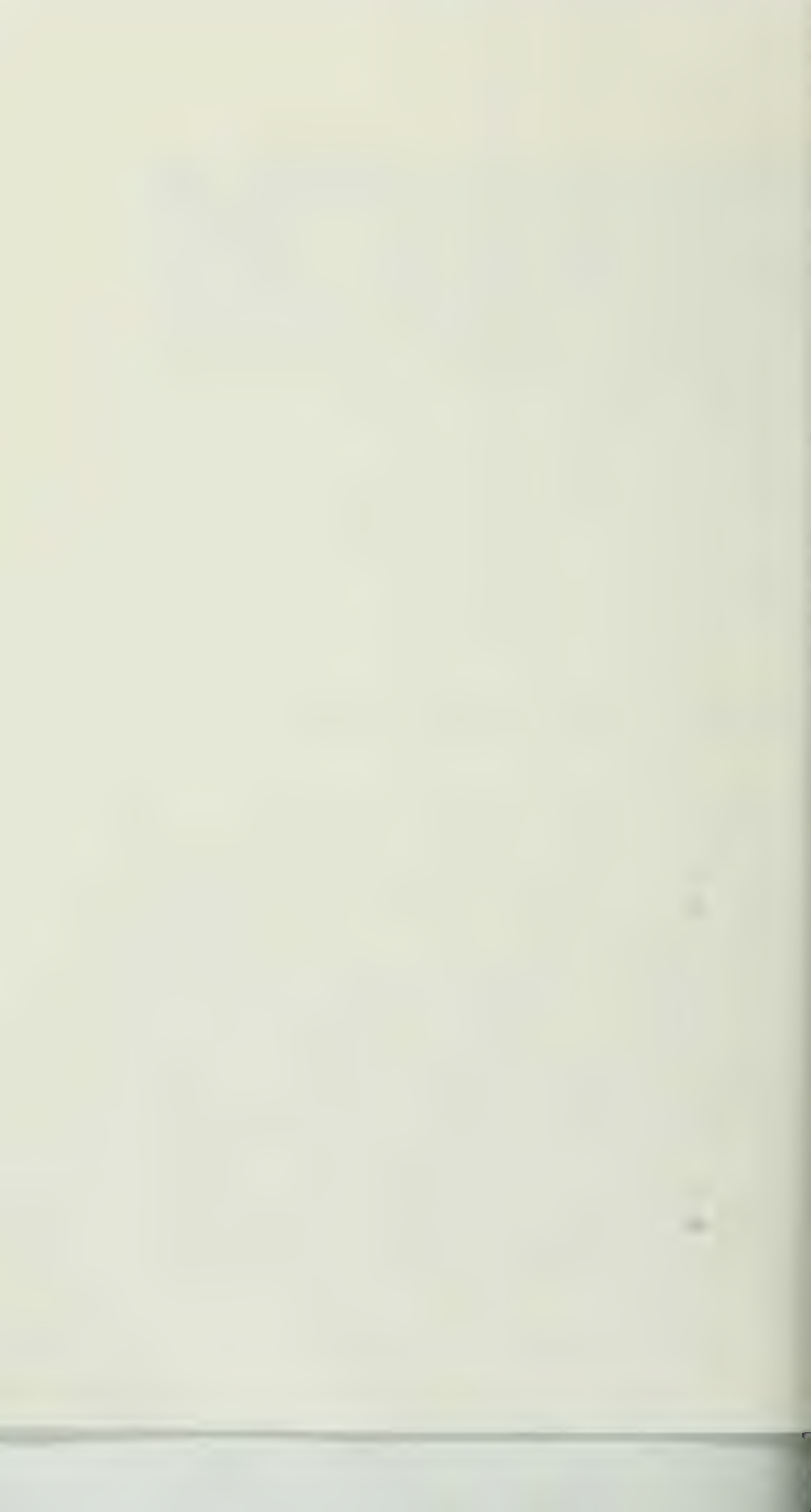
(4) Firstamerica will issue to Transamerica in exchange for the cash and bank stocks described in paragraph (3) above, a total of 11,372,022 shares of its common stock constituting all of its common stock issued and outstanding at this time. These shares will be distributed immediately share-for-share pro rata to Transamerica's stockholders of record as of a date to be subsequently determined by the Board of Directors. The certificates evidencing the shares of Firstamerica will not bear any statement purporting to represent the shares of Transamerica. The ownership, sale and transfer of the shares of Firstamerica and of Transamerica will not be conditioned in any manner upon the ownership, sale or transfer of shares of the other, nor will the shares of either be held in trust for the benefit of the other corporation or its stockholders.

(5) After the exchange and distribution, Transamerica and Firstamerica will have no common officers or directors.

(6) Transamerica will submit this plan to the Board of Governors of the Federal Reserve System for certification under the provisions of the Bank Holding Company Act at the earliest practicable date following approval of the Plan by Transamerica's Directors. Upon receipt of the required certification, the plan will be submitted to the Internal Revenue Service for appropriate tax rulings. Upon receipt of favorable tax rulings, the plan will be submitted to Transamerica's stockholders for their approval at the annual meeting on April 24, 1958, and the exchange and distribution is to be made effective on June 30, 1958, or as soon as practicable thereafter.

(7) All other necessary regulatory approvals will be obtained for each step in the reorganization program.

Application will be made for registration of the shares of Firstamerica under the Securities Exchange Act of 1934 and for listing of the Firstamerica shares on the Pacific Coast and New York Stock Exchanges. Firstamerica will make application to the Board of Governors of the Federal Reserve System for permits to vote its stock in each of its member bank subsidiaries."



In the United States Court of Appeals
for the Ninth Circuit

GOVERNMENT OF GUAM, ex rel. CARLOS G. CAMACHO
and G. RICARDO SALAS, APPELLANTS

v.

HORACE V. BIRD, APPELLEE

On Appeal from the Order of the District Court of Guam

BRIEF FOR THE APPELLEE

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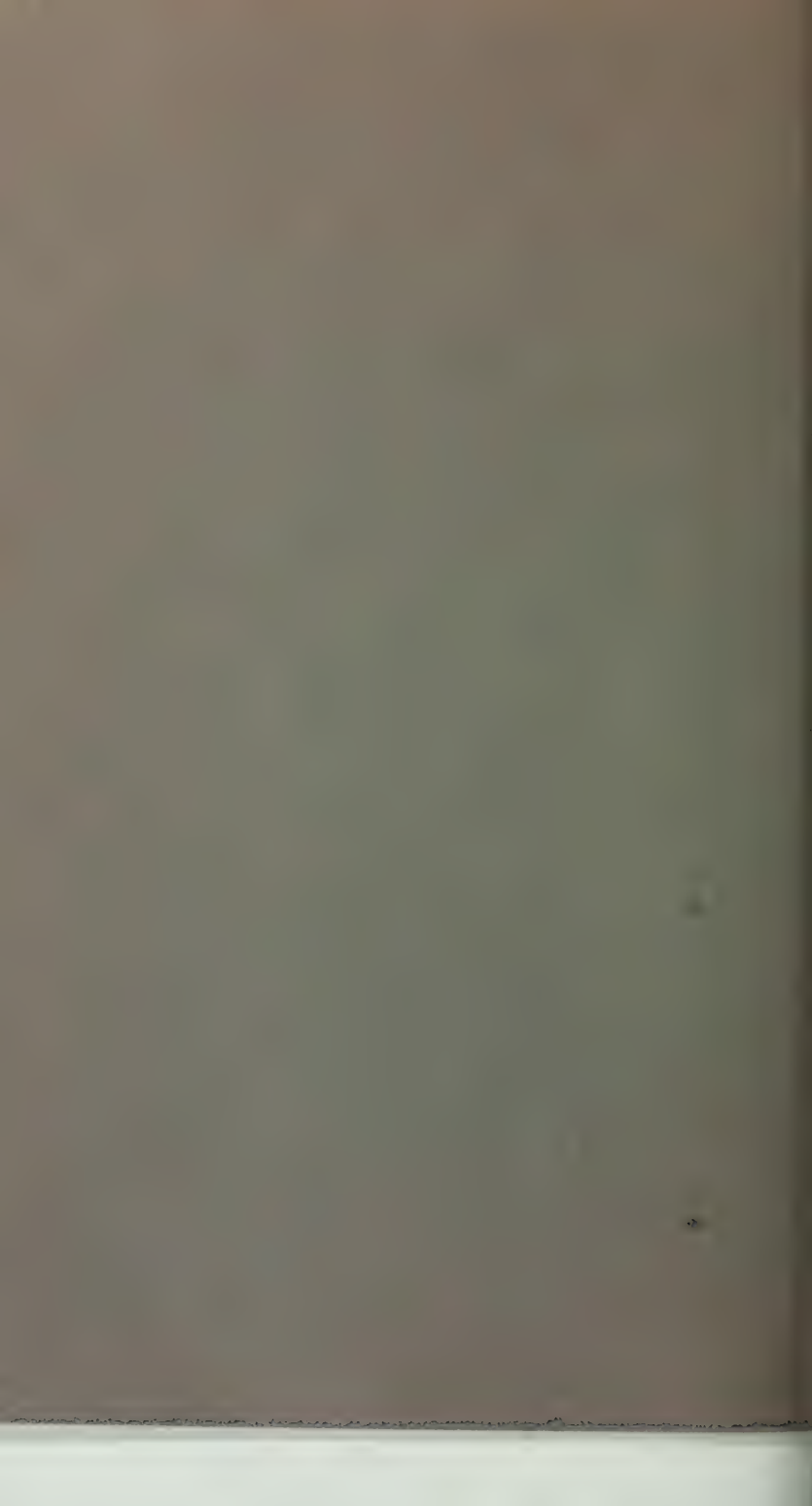
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,503

GOVERNMENT OF GUAM, ex rel. CARLOS G. CAMACHO
and G. RICARDO SALAS, APPELLANTS

v.

HORACE V. BIRD, APPELLEE

On Appeal from the Order of the District Court of Guam

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law (I-R. 21-24) and order (I-R. 37) of the District Court are not officially reported.

JURISDICTION

This appeal is from an order by the District Court of Guam dismissing this action. The order was entered on September 16, 1966. (I-R. 37.) Jurisdiction was conferred on the District Court by Section

22 of the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Sec. 1424). On September 19, 1966, a notice of appeal was filed. (I-R. 38.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court correctly dismissed the complaint because the instant action is, in substance, an unconsented suit against the United States.

2. Whether the District Court correctly dismissed the complaint because appellants, as members of the Guam Legislature, and citizens, taxpayers, electors, and residents of Guam, were without the requisite standing to sue.

STATEMENT

This is an appeal from an order of the District Court of Guam dismissing the complaint herein (I-R. 1-4) for lack of jurisdiction of the subject matter. The complaint alleged that appellants Camacho and Salas were members of the Eighth Guam Legislature and citizens, taxpayers, electors, and residents of Guam. Appellee was Commander, Naval Forces, Marianas, at the time of the institution of this action. (I-R. 21)¹ The United States Navy, through an in-

¹ Since the institution of this action, appellee has been re-assigned from Guam and from the position of Commander, Naval Forces, Marianas. Appellants' motion to remand the case to the District Court so that they could name additional defendants was denied by this Court on September 15, 1967. See Rule 13(4) of the Rules of the United States Court of Appeals for the Ninth Circuit.

strumentality thereof, the Commissioned Officers' Mess, has for many years imported alcoholic beverages into a United States Military Reservation located on Guam for sale to its personnel authorized under the regulations of the Department of Defense. (I-R. 22.)

Section 25600 of the Government Code of Guam provides that alcoholic beverages may be brought into the territory of Guam from outside of Guam for delivery or use within the territory only when the alcoholic beverages are consigned to a licensed wholesaler. (I-R. 21-22.) In the initial complaint, the prayer for relief was limited to a demand for a preliminary injunction prohibiting appellee both individually and as Commander, Naval Forces, Marianas, from transporting and importing intoxicating liquors and alcoholic beverages into Guam for delivery and use therein except on consignment to a licensed wholesaler so that the alcoholic beverage taxes of Guam would be paid. (I-R. 3-4, 22-23.)

In its findings of fact and conclusions of law, the District Court held that the action herein was an unconsented suit against the United States and that appellants were without standing to sue. (I-R. 23.)² Accordingly, after a hearing (I-R. 40-48), the complaint was dismissed with leave to file an amended complaint seeking a permanent injunction (I-R. 25).

² The District Court also suggested, with respect to the merits, that the importation of alcoholic beverages into and for use on a military reservation, despite the fact that the military reservation is located in Guam, is not importation into the territory of Guam for use therein. (I-R. 23.)

In the amended complaint, appellants alleged that the Government of Guam had taken no action to enjoin the importation by appellee of alcoholic beverages into Guam and that a demand on the Government of Guam to do so would be futile. The amended complaint prayed for a permanent injunction against such activity. (I-R. 28.) After another hearing (II-R. 1-6), appellee's motion to dismiss the complaint for lack of jurisdiction over the subject matter (I-R. 32) was granted (I-R. 37). From that action, the instant appeal was taken. (I-R. 38.)

SUMMARY OF ARGUMENT

Appellants instituted the present action against Horace V. Bird, who was Commander, Naval Forces, Marianas, and an officer of the United States Government at the time of the commencement of the suit. They seek a permanent injunction against the importation of alcoholic beverages by the United States Navy into its military reservations in the territory of Guam without payment of the Guam taxes. Although the action is nominally against appellee, it is in substance a suit for specific relief against the United States. The well-settled doctrine of sovereign immunity instructs that such an action cannot lie against the sovereign in the absence of consent. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682. Since there is no contention that the United States has consented to the present action, the District Court correctly dismissed the suit.

Furthermore, in addition to the matter of sovereign immunity, appellants, as members of the Guam legis-

lature, and citizens, taxpayers, electors and residents of Guam, do not have standing to sue. They have not demonstrated that they have been affected directly or indirectly by the Government's action. *Massachusetts v. Mellon*, 262 U.S. 447, 488.

ARGUMENT

I

The District Court Correctly Dismissed the Complaint Because the Present Action Is, In Substance, an Unconsented Suit Against the United States

Although appellants have nominally instituted the present action against Horace V. Bird, formerly the Commander, Naval Forces, Marianas, and on officer of the Government, their stated purpose is to restrain the United States Navy, whether acting through the agency of the named defendant or any other person, from importing alcoholic beverages into its military reservations in the territory of Guam without payment of Guam taxes. (I-R. 3-4.) Such a suit constitutes an action against the sovereign since the judgment sought would plainly "expend itself on the public treasury or domain, or interfere with public administration" (*Ex parte State of New York*, No. 1, 256 U.S. 490, 502) and because the effect of such a judgment, if obtained, would be to restrain the Government from acting (*Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704). The well settled judicial policy, as repeatedly held by the Supreme Court, is to forbid suits against the sovereign without its consent. Such consent not having been given, the District Court had no jurisdiction and correctly dismissed the

complaint. *Dugan v. Rank*, 372 U.S. 609; *Malone v. Bowdoin*, 369 U.S. 643, *Larson v. Domestic & Foreign Corp.*, *supra*. See also *Hawaii v. Gordon*, 373 U.S. 57, 58, and *Crain v. Government of Guam*, 195 F. 2d 414 (C.A. 9th).

In discussing the principle of sovereign immunity from an unconsented suit in *Larson v. Domestic & Foreign Corp.*, *supra*, Chief Justice Vinson, pp. 687-693, disposed of all of the contentions directly or indirectly advanced by the instant appellants. It is there said, for example (pp. 687-688), that:

The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.

If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. * * * But controversy there has been, in this field above all others, because it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. * * * the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. *For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained.* As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is

not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. (Emphasis supplied.)

As further set out in *Larson v. Domestic & Foreign Corp.*, *supra*, pp. 689-690, the principle of sovereign immunity applies with only two exceptions—neither of which obtains here. The first is where the powers of the named defendant are specifically limited by statute and the act sought to be enjoined is in violation of that limitation. Here, appellants do not allege, or cite, any statutory limitation upon the power of the appellee to bring alcoholic beverages into the federal military reservation on Guam—either with or without payment of taxes.³ This he did in the exer-

³ Appellant maintains (Br. 9) only that, because importation of alcoholic beverages is merely “authorized” by Department of Defense regulations, it does not constitute exercise of a sovereign function. But the regulations in question were issued pursuant to authority granted to the Secretary of Defense by Section 6 of the Universal Military Training and Service Act, c. 144, 65 Stat. 75 (50 U.S.C. Appendix, 1964 ed., Sec. 473), to “make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces * * * at or near any camp, station, post or other place primarily occupied by members of the Armed Forces * * *.” The contention is, therefore, patently incorrect.

cise of his official judgment as an act calculated to contribute to the efficient maintenance of the military base and its personnel. His construction of the Guam law as not requiring payment of Guam taxes thereon was also made in the exercise of his official powers and within the ambit of the responsibilities entrusted to him. It is made clear in *Larson v. Domestic & Foreign Corp.*, *supra*, pp. 690, 692, that a claim that the defendant had erred in the exercise of a power granted to him will not void the immunity from unconsented suit.

Finally, the Court emphasized the plenary protection conferred by the immunity rule where, as here, it is sought to enjoin the sovereign, saying (p. 703):

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief. For it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole,*

cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. (Emphasis supplied.)

In short, the considerations giving rise to the policy of sovereign immunity are all present in the case at bar; on the other hand, none of those are present which have occasionally been made the basis of an exception. The essential functions of the Government cannot be stopped by appellants, who apparently desire merely to assert the Guam tax against the United States. Accordingly, the District Court properly recognized that it was without jurisdiction to decide the instant unconsented suit and correctly dismissed the complaint.

II

The District Court Correctly Dismissed the Complaint Because, In Addition to the Matter of Sovereign Immunity, Appellants, as Members of the Guam Legislature and Citizens, Taxpayers, Electors and Residents of Guam, Were Without the Requisite Standing to Sue

Appellants brought the instant action in their capacity of members of the Guam Legislature, and citizens, taxpayers, electors and residents of Guam. (I-R. 1.) We submit that, even if there were here no sovereign immunity, the court below correctly held that appellants lack standing to sue because they have not shown that they have sustained or are immediately in danger of sustaining some direct injury as opposed to merely suffering "in some indefinite way in common with people generally." *Massachusetts v. Mellon*, 262 U.S. 447, 462. See also *Anti-Fascist*

Committee v. McGrath, 341 U.S. 123, 149-157 (concurring opinion of Justice Frankfurter).

Although appellants' complaint alleged that the Government of Guam has been deprived of tax monies due under the Alcoholic Beverage Tax Act of Guam (I-R. 3), they have not shown that they have been affected with sufficient directness. Appellants have not demonstrated with any specificity that immunity from the Guam tax of the alcoholic beverages imported by the United States Navy has in any way added measurably to their tax burden. *Sheldon v. Griffin*, 174 F. 2d 382, 383 (C.A. 9th). Cf. *Reynolds v. Wade*, 249 F. 2d 73 (C.A. 9th). Nor can they invoke the authority which allows taxpayers of a municipality standing to sue to prevent certain expenditures. This theory is grounded upon the analogy of residents of a municipality to shareholders of a corporation. Cf. *Crampton v. Zabriskie*, 101 U.S. 601. See also *Bradfield v. Roberts*, 175 U.S. 291.

Clearly, any cause of action which might lie against the United States for taxes due under the Guam statute belongs to the Government of Guam, and not to appellants. What they appear to complain of is the alleged failure of the Government of Guam to attempt to collect the tax from the United States. Thus, even if appellants had a litigable right with respect to such taxes, it would only be by way of an action against the Government of Guam to compel it to attempt collection.⁴

⁴ But, in fact, appellants have no cause of action even to compel the Government of Guam, through its Attorney Gen-

Finally, as the District Court emphasized in its final disposition of the case (II-R. 1-6), the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Secs. 1421-1426) does not provide for any right of action by citizens of Guam to compel their government to take any particular course of action. On the contrary, the Organic Act of Guam, *supra*, Section 21 (48 U.S.C. 1964 ed., Sec. 1423k) provides: "The legislature or any person or group of persons in Guam shall have the unrestricted right of petition." Cf. *Smith v. Government of Virgin Islands*, 329 F. 2d 131 (C.A. 3d); *Buscaglia v. District Court of San Juan*, 145 F. 2d 274, 284 (C.A. 1st). Since there is no right of action given appellants by statute, or by the United States Constitution, adverse personal interest is required. Cf. *Parker v. Fleming*, 329 U.S. 531; *Coleman v. Miller*, 307 U.S. 433. None has here been shown.

eral, to adopt their interpretation of the Alcoholic Beverages Act—a matter clearly subject to that officer's discretion. *Work v. United States ex rel. Rives*, 267 U.S. 175, 177-178.

CONCLUSION

In the light of the foregoing, the order of the District Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of, 1967.

STUART A. SMITH
Attorney

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MUTUAL INDUSTRIES, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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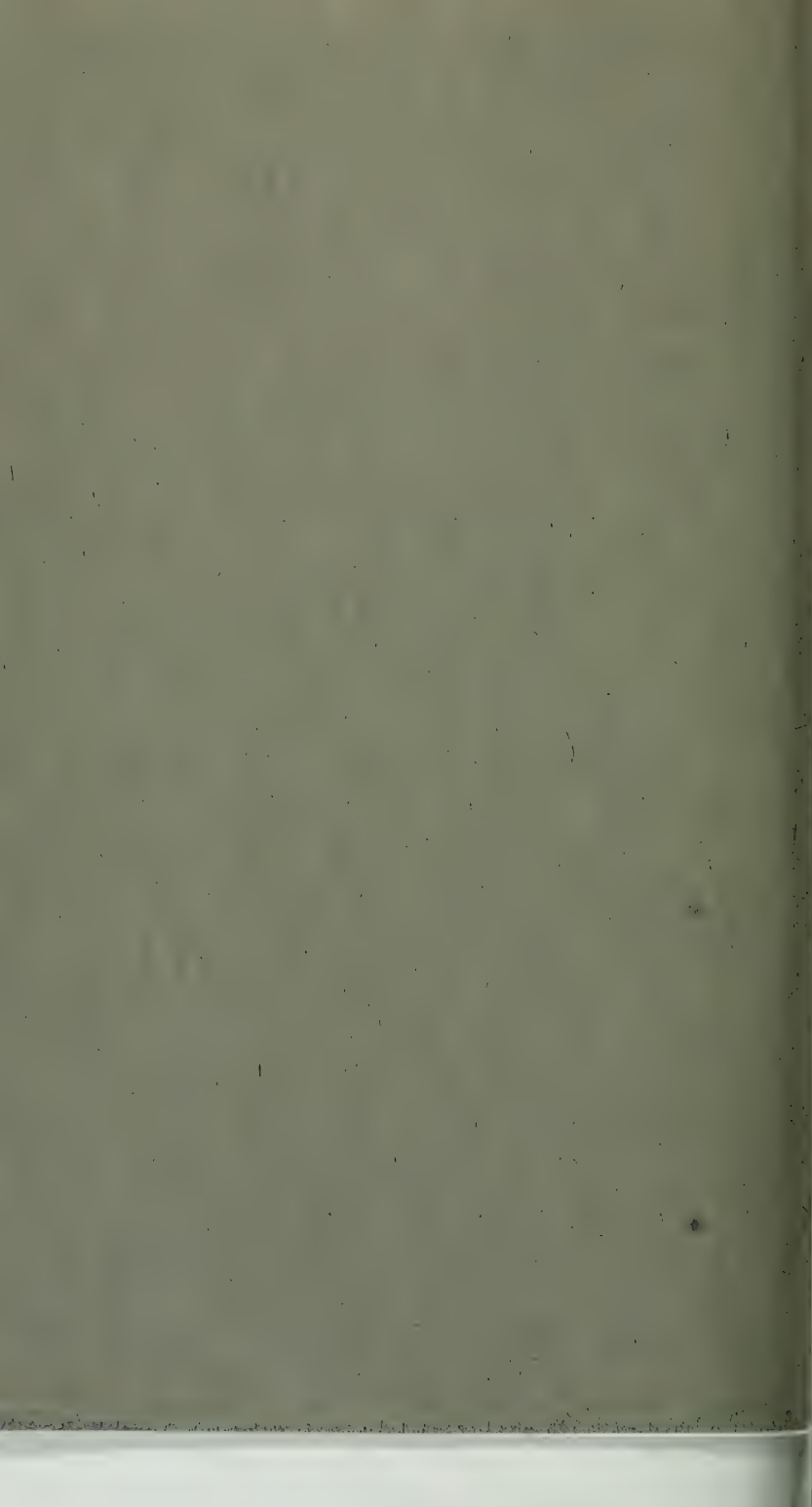
National Labor Relations Board.

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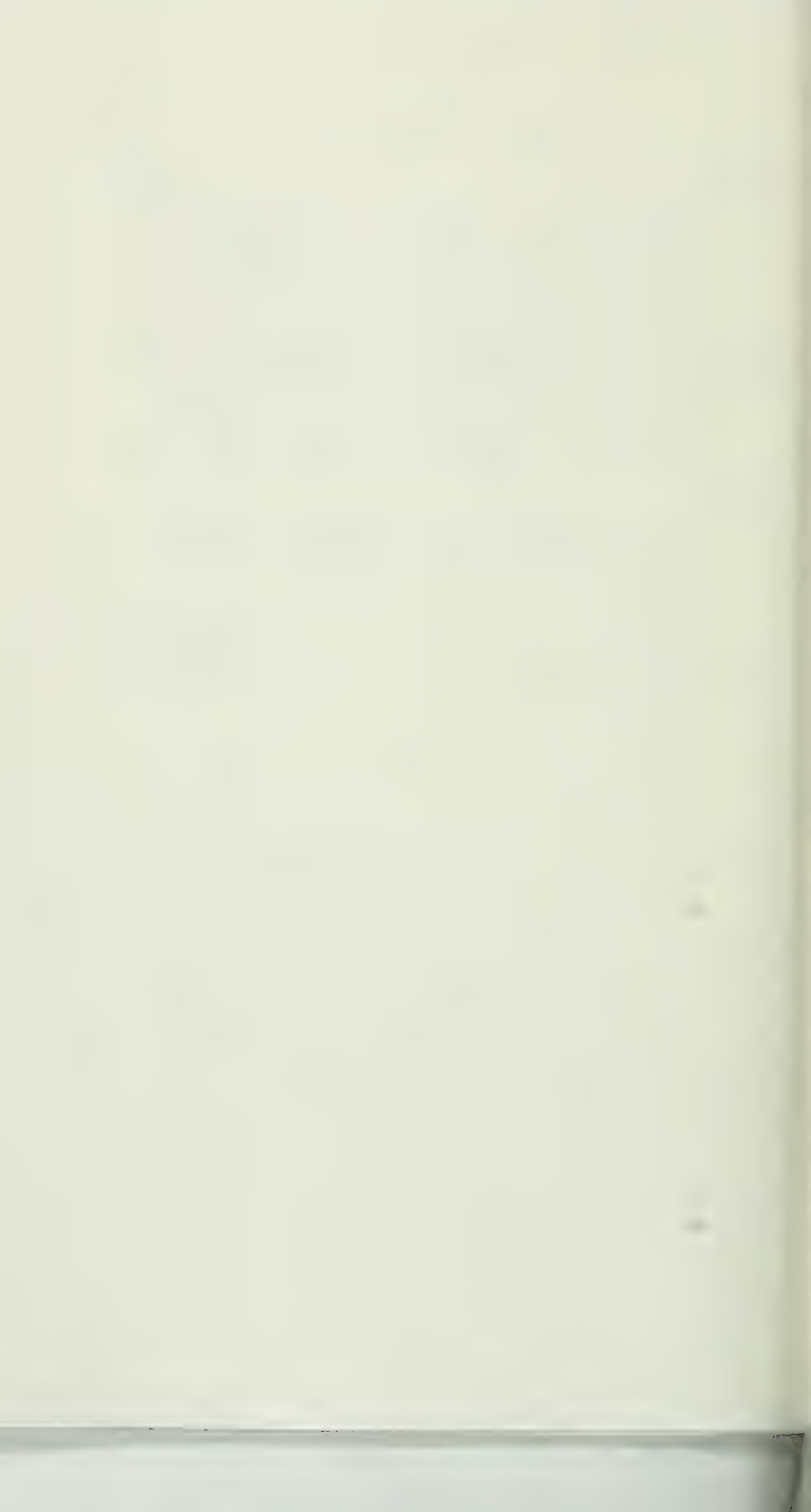
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,509

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MUTUAL INDUSTRIES, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against Mutual Industries, Inc., (herein called the Company), on June 21, 1966. The Board's Decision and Order

¹ Pertinent statutory provisions are reprinted *infra*, pp. 21-23.

(R. 17-30, 36-37) are reported at 159 NLRB No. 73.² This Court has jurisdiction pursuant to Section 10 (e) of the Act, the unfair labor practices having occurred in Los Angeles, California, where the Company is engaged in the manufacture of bias binding and webbing.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

In brief, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union³ after it had recognized the Union and conducted negotiations with it over a period of four months. The Board found that the Company also violated Section 8(a)(5) and (1) by promising the employees a health insurance plan to discourage them from joining or adhering to the Union. The facts upon which these findings are based are set forth below.

A. *The Union organizes the Company's employees; the Company signs a recognition agreement*

In February or March 1965, the Union commenced an organizational campaign at the Company's Los

² References to the pleadings, the Decision and Order of the Board, and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to the stenographic transcript of record reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References designated "GCX" are to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

³ Los Angeles Dress and Sportswear Joint Board, International Ladies Garment Workers' Union, AFL-CIO.

Angeles plant (R. 19; Tr. 249, 256).⁴ In late March, after earlier communications on the subject of recognition by letter and telephone, Sam Schwartz a Union organizer, visited the Company's plant with Jack Spindler, a Union business agent (R. 19; Tr. 31-32, 128, GCX 9). There they met with David Meyers, the plant manager and Norman Gross, the Company's Los Angeles sales director. (R. 18-19; Tr. 247, 375, 349). Schwartz advised Meyers that the Union represented a majority of the Company's employees in the Los Angeles plant and proposed an agreement recognizing the Union as the exclusive bargaining representative of its employees (R. 19; Tr. 31-32, 128-129). Meyers agreed, suggesting that Schwartz prepare and bring the recognition agreement to him for signature (R. 19; Tr. 32, 129). Meyers also indicated that he would have to contact the Company's headquarters in Philadelphia, Pennsylvania, to obtain approval before he signed (R. 19; Tr. 129).⁵ Schwartz told Meyers that Spindler would bring the employees'

⁴ All dates hereafter are in 1965 unless otherwise indicated.

⁵ During the discussion, Meyers described certain management problems he was having at the plant, indicated that he would like to discharge certain employees, and pleaded for concessions from the Union since the plant had been in operation only a short time. Schwartz assured Meyers that in view of the infancy of the Los Angeles operation, the Union would try to give it "every break under the sun" (R. 19-20; Tr. 32-33, 130), but made it clear that as the bargaining representative of the employees the Union could not endorse the discharge of any employee. Instead, Schwartz suggested working out an agreement for a probationary period during which the Company could readily discharge new employees (R. 19; Tr. 129).

authorization cards to show to Meyers before he signed the recognition agreement (R. 20; Tr. 130-131).

On April 13, Spindler went to the plant and presented both the recognition agreement and ten authorization cards to Meyers (R. 20; Tr. 33-34, 41-42, 69-70).⁶ The agreement which was dated April 12 and had been signed by John Ulene, the Union's manager, reads as follows:

It is agreed that Mutual Industries of California, Inc., hereby recognizes the Los Angeles Dress and Sportswear ILGWU, AFL-CIO, as the bargaining agent of all of its production and maintenance employees (including shipping and receiving department employees) employed at its plant at 1118 Santa Fe Avenue, Los Angeles, California.

The first negotiating conference for a collective-bargaining agreement shall take place April 12, 1965, and shall continue until concluded.

It is the Company's intention at the present time that the final phase of negotiations will be undertaken by the principal officers of the Company who will shortly be in Los Angeles for that purpose (R. 20; G.C.X. 4).

⁶ On April 13, there were fourteen employees in the Union's production and maintenance unit (R. 23; Tr. 222-224). The Trial Examiner found that all ten cards shown to the Company that day validly designated the union as the bargaining representative (R. 23; Tr. 222-224, G.C. Exh. 3a-3j). The Board agreed as to nine cards: it did not rule on the tenth (employee Kardischian's) because her card was surplus to the Union's majority (R. 36, n. 1).

After looking at the authorization cards, Meyers signed the above agreement, remarking "I know you have this shop, and there will be no problems" (R. 20; Tr. 36, 41-42).⁷

B. The Company consents to negotiations with the Union twice during the next four months

About April 20, Spindler, on Schwartz's instructions, presented Meyers with a copy of a collective bargaining agreement prevalent in the garment industry. A few days later, Meyers advised Schwartz that he had sent the proposal to Dunn and that Dunn would be in Los Angeles about May 15. When Schwartz indicated that he would be in the East on that date, Meyers suggested that Schwartz telephone Dunn sometime during Schwartz' visit (R. 21; Tr. 137-138).

About May 12, Schwartz telephoned Dunn from Miami and requested a meeting to conclude an agreement on the basis of the Union's proposal. Dunn pleaded the newness of the Los Angeles operation; Schwartz promised to take this fact into account. Dunn asked Schwartz to call him on May 25. (R. 21; Tr. 131-141). When Schwartz called Dunn on that date, he was informed that Dunn was in Los Angeles (R. 21; Tr. 142). Schwartz then called Samuel Otto,

⁷ Meyers denied that the Union showed him its signed cards (Tr. 258). He admitted reading and signing the Union's document but asserted that the Union representatives had told him that its only purpose was to show that the Union was the first to attempt to organize his plant (Tr. 259). The Trial Examiner's resolution of this issue is discussed *infra*, p. 11.

the Union's Pacific Coast Director, and asked him to call Dunn in Los Angeles. Otto was unable to reach Dunn in Los Angeles. In late May, Otto visited Philadelphia and tried unsuccessfully to arrange a meeting with Dunn before returning to Los Angeles. Unable to do so, Otto turned the matter over to Samuel Ross, the manager of the Union's Philadelphia Dress and Sportswear Joint Board. (R. 21; Tr. 143, 175). Schwartz then sent Ross a copy of the same industry agreement given to Dunn and told Ross what concessions he could make (R. 21; Tr. 143; GCX 10).

On June 27, Ross and Dunn met at the latter's office and discussed, among other subjects, pay rates, apprenticeship, fringe benefits, and the Company's existing wage structure (R. 21; Tr. 176-181). No agreement was reached but Dunn told Ross that he would authorize Meyers to continue negotiations on these matters and to conclude an agreement (R. 21; Tr. 179-180). Accordingly, on July 1, in Los Angeles, Schwartz telephoned Meyers and a meeting was arranged for July 6 (R. 22; Tr. 156-157, 262). Wage rates were discussed in greater detail (R. 22; Tr. 156). After the meeting Schwartz, pursuant to Meyers' request, reduced the Union's wage proposal to written form. On July 14, he delivered the written proposal to Meyers, who forwarded it to Dunn. (R. 22; Tr. 54-55, 159).

C. The Company breaks off communications with the Union without notice or explanation

In the first week of August, Schwartz called Meyers to ask whether he had heard from Dunn. Meyers said

he had not and suggested that Schwartz deal directly with Dunn (R. 22; Tr. 159). Later that day and on the next business day Schwartz telephoned Dunn a total of four times. (R. 22; Tr. 159-160). Dunn refused to accept or return Schwartz's calls (R. 22; Tr. 370). According to Dunn's testimony, he terminated negotiations with the Union because of his belief that a majority of the employees did not want a union and that the Company was unable to pay the rates requested by the Union (R. 22; Tr. 389-391).

About August 23, Schwartz telephoned Meyers to learn whether he had heard from Dunn. Meyers said that Dunn would be in Los Angeles the next day; he agreed to have Dunn call Schwartz (R. 22; Tr. 160-161). The next day, August 24, Schwartz sent Dunn the following telegram at the Los Angeles plant:

"Being you and your attorney are in Los Angeles.
Request we meet for closing of collective bargaining agreement heretofore negotiated"

(R. 22; Tr. 161-162, GCX 11). Dunn never replied. (R. 22; Tr. 161-163)

The Union's last communication with the Company was in late August or early September when Robert Wachs, counsel for the Company, and Schwartz had a telephone conversation. Wachs asked if the Union would consent to an election, promising a fast election if the Union agreed. Schwartz referred Wachs to Feinberg, counsel for the Union, whereupon Wachs retorted, "Well, let me tell you this: if you don't con-

sent to an election, we could drag this thing around” (R. 22; Tr. 163).

D. *The Company announces plans for medical insurance*

Some time in July, foreman Anthony Elias announced to the employees that the Company was offering them a medical insurance plan in lieu of union representation. At the same time, he collected information regarding the employees’ age and dependents for submission to the insurance carrier (R. 23; Tr. 74-75, 205, 208, 215-216, 218, 239). Admittedly, neither Meyers nor Dunn ever notified or bargained with the Union regarding a health insurance plan (R. 23; Tr. 313, 367).⁸

II. The Board’s Conclusions and Order

On the basis of the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act when it refused to bargain with the Union after it had recognized the Union’s majority status and had entered into negotiations with it, and, again, when it bypassed the Union to bargain directly with the employees regarding a term and condition of employment (R. 25-26). The Board’s Order directs the Company to cease and desist from the unfair labor practices found and from in any like or related man-

⁸ The plan was never put into effect; apparently the employees lost interest in it when they realized that the Company’s contribution would be limited to securing a group policy and performing the required administrative work (R. 23; Tr. 215-216, 231-232, 268).

ner interfering with its employees' Section 7 rights. Affirmatively, the Board's order requires the Company to bargain with the Union upon request and to post appropriate notices (R. 27-28).

ARGUMENT

I. The Board Properly Found That the Company Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain With the Union After Initially Recognizing It and Commencing Negotiations

As shown in the Statement, pp. 2-7 the Company signed a recognition agreement with the Union on April 13, 1965, after the Union presented authorization cards signed by 10 of its 14 employees.⁹ The Union promptly submitted a proposed contract. During the next four months, the Union's strenuous efforts to meet with the Company produced only two negotiating sessions. At the first session in Philadelphia on June 27, Vice-President Dunn reviewed the Union's contract proposal, particularly its wage demand, with Union representative Ross. At the second session on July 6, Plant Manager Meyers, at Dunn's direction, discussed the Union's wage demands in greater detail. At Meyers' request, the Union gave him its full wage proposal in written form on July 14; Meyers forwarded it to Dunn. Although he received the proposal, Dunn failed to respond. Instead, as he ad-

⁹ The unit sought by the Union, and found appropriate by the Board, comprised the production and maintenance employees, including shipping and receiving department personnel, plus a single truckdriver (R. 23). See *Gordon Mills, Inc.*, 145 NLRB 771, 773.

mitted, he frustrated the Union's repeated efforts to get in touch with him, and refused thereafter to communicate with the Union. *Prima facie*, this conduct violated the Company's statutory duty to bargain.¹⁰ In defense, the Company claims that it withdrew from negotiations on the basis of a good faith doubt of the Union's majority status. The Company also argues that the Union was never entitled to recognition. As we show below, both defenses were properly rejected by the Board.

A. *Substantial evidence on the whole record supports the Board's finding that the Company withdrew from bargaining to avoid a contract*

Before the Board, the Company's position was that the Union sought to discuss a contract with the Company but made no claim that it had organized the plant; that Meyers and Dunn agreed to such discussions as a matter of courtesy; and that Dunn subsequently broke off negotiations because the Union's wage proposal was too high, with no idea that the Union had, or claimed to have, a majority. Central to this defense is Meyers' assertion that he signed the April 13 recognition agreement in the belief that its sole import was to evidence the Union's having made the first attempt to organize the plant (Tr. 259, 260).

¹⁰ *N.L.R.B. v. Security Plating Company, Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9); cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F. 2d 468, 471-472 (C.A. 7).

However, the Trial Examiner credited the testimony of Union representatives Schwartz and Spindler that Meyers had earlier agreed to sign a recognition agreement if Dunn had no objection; that Meyers flipped through the cards submitted by Spindler on April 13, saying "I know you have this shop and there will be no problems;" and that he then signed the recognition agreement. The Trial Examiner's resolution merits affirmance, based as it was on his unique opportunity to observe Meyers' demeanor on the witness stand.¹¹ Furthermore, Meyers' testimony strains credulity. As the Trial Examiner noted, Meyers was college-trained, with 18 years experience as production manager of a unionized plant prior to his employment by the Company. The recognition agreement (GCX 4) is short and unambiguous; admittedly, Meyers read it before he signed (Tr. 260, 288).¹²

The Trial Examiner was also entitled to reject Vice President Dunn's assertions that he was never apprised of the Union's claim to be the bargaining representative and did not learn that Meyers had executed a recognition agreement until after the Union filed an unfair labor charge (Tr. 362). As Dunn's testimony establishes, prior to his meeting with Un-

¹¹ *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408; *N.L.R.B. v. Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 469 (C.A. 9).

¹² It is also significant that Meyers denied receiving the Union's original request for recognition (GCX 9), whereas his pre-trial statement admitted that he received the letter and "immediately forwarded [it] to the Company in Philadelphia" (Tr. 274).

ion representative Ross on June 27, he made a careful study of the Union's proposed contract (Tr. 402). Dunn also admitted directing Meyers to meet with Union officials in Los Angeles in order to obtain the details of the Union's wage proposal (Tr. 404); the Union's proposal was then sent to Dunn (Tr. 405). It is hardly likely that Dunn, with responsibility for the Company's labor relations at five widely separated plants (R. 18), would have given this amount of time and attention to the proposals of a union which, according to Dunn, did not claim to represent the Company's employees.

Nor is it necessary to linger over Dunn's assertion that he terminated negotiations with the Union, in part, because he doubted the Union's majority status. As Dunn conceded, his doubt was founded entirely on assurances from Meyers that the Union had no majority (Tr. 376). We submit that Dunn's doubt can aspire to no greater validity than that of Meyers' doubt. For his part, Meyers admitted that his only information about the Union's status came from a single conversation with Foreman Anthony Elias which took place a month before Meyers executed the recognition agreement: he asked Elias if a majority of the employees were in favor of the Union, and Elias replied, according to Meyers, that "he didn't think they did" (Tr. 256). As the Trial Examiner observed, such information was "a flimsy basis on which to claim a good faith doubt as to the Union's majority" (R. 26).¹³ Moreover, Elias, *a Company*

¹³ Compare *N.L.R.B. v. Howe Scale Co.*, 311 F. 2d 502, 504 (C.A. 7) (a good faith doubt must have "a rational basis in

witness, testified that he had told Meyers only that "[s]everal people didn't want [the Union];" he expressly denied telling Meyers that a *majority* of the employees did not want the Union (Tr. 239).

In short, the Board was entitled to find that the Company recognized the Union on April 13 because it was satisfied about the Union's majority; that it entered upon negotiations reluctantly during the next four months; and that its withdrawal from negotiations after receiving the Union's wage demands was a "[rejection of] the collective bargaining principle" (R. 26).

B. The Union was validly designated as the bargaining representative

As related *supra*, pp. 3-7, beginning in February, the Union solicited the employees to sign a card designating the Union "to act exclusively as [their] agent and representative for the purpose of collective bargaining." During Meyers' first meeting with Union representatives Spindler and Schwartz late in March, Meyers acquiesced in the Union's suggestion that he sign a recognition agreement without raising any question about the Union's majority status.¹⁴ When Meyers executed the recognition agreement at

fact"); accord, *N.L.R.B. v. John S. Swift Co.*, 302 F. 2d 342, 346 (C.A. 7).

¹⁴ While Meyers could remember little about this meeting, he testified that he may have believed Spindler when the latter told him (on an occasion unspecified) that the Union had a majority because "I have never known him to lie to me" (R. 20; Tr. 276).

the April 13 meeting after examining the Union's cards, it was with the statement "I know you have this shop, and there will be no problems" (R. 20; Tr. 36, 41-42). Thereafter, the Company evaded most of the Union's efforts to bring it to the bargaining table, but never challenged the Union's majority. Nor did Company Vice President Dunn indicate doubt about the Union's status when he made himself unavailable to the Union after receiving its wage proposal. Thus, it was during the hearing that the Company for the first time disputed the Union's right to recognition, claiming that it had been dubious about the Union's majority from the beginning. Having formally recognized the Union and having engaged in negotiations with it for some four months without questioning the Union's representative status, we submit that the Company may not be heard to claim that the Union was not entitled to be recognized.¹⁵

In any event, the record fully supports the Board's finding that the Union had 9 valid authorization cards on April 13 when it executed a recognition agreement covering the Company's 14 unit employees. Contrary to the Company, the Trial Examiner properly received in evidence the cards signed by employees Rodriguez, Hill and Thomas, although they did not testify. The cards were authenticated by Trudy Slaughter, a Union organizer, who testified that the trio signed the cards in her presence (R. 24; Tr. 18-22). The law

¹⁵ See, *Retail Clerks Union, Local No. 1179 v. N.L.R.B. (John P. Serpa, Inc.)*, C.A. 9, No. 20,781, decided March 28, 1967; *Snow & Sons v. N.L.R.B.*, 308 F. 2d 687, 693-694 (C.A. 9).

is settled that authorization cards may be authenticated by a witness to their execution. *N.L.R.B. v. Howard Cooper Corp.*, 259 F. 2d 558, 560 (C.A. 9); accord: *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128, 134 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F. 2d 468, 471 (C.A. 7).

Nor is there merit in the Company's contention that the designations of Mario and Eloy Elias are vitiated by misrepresentations made to them at the time they signed their cards. Where, as here, authorization cards are "wholly unambiguous" in designating the Union as bargaining representative, only the clearest evidence that some *material misrepresentation* preceded the signing of the cards will interdict the conclusion that the employees signed them for the stated purpose. *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F. 2d 917, 920 (C.A. 6); accord: *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686 (C.A. 2), and cases cited; *Amalgamated Clothing Workers v. N.L.R.B.*, (*Hamburg Shirt Corp.*), 371 F. 2d 740 (C.A. D.C.); *N.L.R.B. v. Glasgow Co.*, 356 F. 2d 476, 478-479 (C.A. 7); *Happach v. N.L.R.B.*, 353 F. 2d 629, 630 (C.A. 7). For example, clear proof that a solicitor told an employee that obtaining a Board election was the *sole* purpose of signing a card will serve to invalidate the execution of even an unambiguous card. For, such a representation contradicts the card's declared purpose and is calculated to coax an authorization from employees who might not otherwise give it. Cf. *Englewood Lumber Co.*, 130 NLRB 394, 395, 408. In contrast, a card is not rendered invalid because the

signer was told that obtaining an election was one purpose of the cards. For, this representation neither contradicts the statement on the card nor requires the inference that the employee would not have signed the card had he known that the Union might obtain recognition without a Board election. *N.L.R.B. v. Hyde*, 339 F. 2d 568, 571-572 (C.A. 9); and cases cited above.

Applying this standard, the Trial Examiner properly ruled that Mario and Eloy Elias' cards effectively designated the Union. Thus, Mario Elias signed his card at the Union hall, having gone there to tell Union agent Spindler that he was about to start work for the Company (Tr. 95-96). After discussing the fact that the Company was not yet organized, Mario filled out the whole card except the date and gave it to Spindler (R. 99). The Company relies on Mario's testimony that Union representative Spindler asked him to sign a card so that Spindler "could have more authority to go into the shop and talk to the workers there to join the Union," and that Spindler stated that he (Spindler) "couldn't go in there without permission that the workers wanted to see him" (Tr. 97, 98). This testimony falls far short of showing that Mario was induced to sign a card by a material misrepresentation. For there is no evidence that Spindler told him that the *only purpose* of the card was to gain Spindler admission to the plant. Indeed, the cited testimony shows that Mario understood that by signing a card he was helping Spindler to organize the Company's employees. Under the circumstances, the Board could fairly conclude that Mario signed

the Union's straight-forward card because he wanted the Union to represent him *and* because he believed that signing a card would facilitate organizing the plant. This conclusion is buttressed by the fact that he was a member of the Union—and had been for some eight years—when he signed the challenged card (Tr. 94-95).

In Eloy Elias' case, the Company cites his testimony that Spindler said to him: "This card doesn't mean anything. We just like to know how many people are going to be in here so we can keep other names, and we will establish a union, see if we can get a union" (Tr. 115-116). But Eloy also testified that he had been a member of the Union for some five years (Tr. 111), that he had taken out a withdrawal card because he changed to another kind of work (Tr. 110), and that he did not read the Union's authorization card before signing it "because [he] knew what it was"—i.e., a card "giving permission to the Union to . . . represent me" (Tr. 111).

In sum, the Union was the validly designated majority representative on April 13, 1965, when the Company executed a recognition agreement, and in August of that year when the Company admittedly broke off negotiations with it. Since, as shown in the preceding section, the Company lacked any justification under the Act, the Board properly found that its withdrawal from the negotiations violated Section 8(a)(5) and (1). See, in addition to cases cited *supra* p. 10, n. 10, *N.L.R.B. v. Kellogg's, Inc.*, 347 F. 2d 219, 220 (C.A. 9); *N.L.R.B. v. Niskayuna Con-*

sumers Cooperative, F.2d (C.A. 2), 64 LRRM 2127, 2128.

II. The Board Properly Found That the Company's Offer of Medical Insurance "in Place of a Union" Violated Section 8(a)(5) and (1) of the Act

As shown above, p. , uncontradicted testimony established that in July 1965, Foreman Elias announced to the employees that the Company was offering a group hospitalization plan as a substitute for union representation. Admittedly, neither Meyers nor Dunn consulted or bargained with the Union at any time regarding such a benefit. Since the Union was the designated representative of the Company's employees—and the Company was in fact negotiating with the Union in July—the Company was under a duty to deal with the Union exclusively regarding the wages, hours and conditions of employment of the unit employees.¹⁶ *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 684. The fact that Elias' words presented hospital insurance and union representation as alternatives, justified the Board's conclusion that the announcement was intended "to discourage the employees from joining or adhering to the Union" (R. 26). But, irrespective of the Company's motive, its unilateral action derogated from its bargaining obligation to the Union and violated Section 8(a)(5)

¹⁶ Of course, a group hospitalization plan is "a term [or] condition of employment" within the meaning of Section 8 (d) of the Act. *W. W. Cross & Co. v. N.L.R.B.*, 174 F. 2d 875, 878 (C.A. 1) ; *Ken's Building Supplies, Inc. v. N.L.R.B.*, 333 F. 2d 84, 87 (C.A. 6).

and (1) of the Act. *N.L.R.B. v. Katz*, 369 U.S. 736, 743 and cases cited. See also *N.L.R.B. v. Hyde*, 339 F. 2d 568, 572 (C.A. 9); *N.L.R.B. v. Kit Mfg. Co.*, 335 F. 2d 166, 167 (C.A. 9), cert. denied, 380 U.S. 910; *N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529-530 (C.A. 9); *Carpinteria Lemon Association v. N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), cert. denied, 354 U.S. 909.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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April 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other

terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein,

and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court.

GENERAL COUNSEL'S EXHIBITS

<u>Exhibit No.</u>	<u>Identified</u>	<u>Received</u>	<u>Rejected</u>
1(a) through 1(n)	7	7	
2	9	9	
3(a) through 3(e)	17	221	
4	33	43	
3(f) through 3(j)	37	221	
5	47	47	
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8	122		
9	127	127	
10	143	144	
11	161	162	
12	185		
13	191		
14	200		
15	207		
16(a) and (b)	220		
17			305
18	387		

No. 21,509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MUTUAL INDUSTRIES, INC.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF OF RESPONDENT MUTUAL INDUSTRIES, INC.

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FILED

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BRIEF OF RESPONDENT MUTUAL INDUSTRIES, INC.

Statement of Case.

This matter comes before this Court by way of petition filed by the National Labor Relations Board, hereinafter called Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et. seq.*) said petition seeks enforcement of an Order of the Board, which Order was issued on June 21, 1966, and which adopts, in almost every respect, the "Trial Examiner's findings, conclusions and recommendations" [R. 36].¹

¹References to the pleadings, the decisions and orders of the Board, and other papers, reproduced as "Volume I, Pleadings" are designated R. Reference to the stenographic transcript of the record reproduced pursuant to Rules 10 and 17 are designated "Tr."

The Board originally brought the action based upon a charge by the Los Angeles Dress and Sportswear Joint Board, International Ladies' Garment Workers Union, AFL-CIO, hereinafter called Union, against Mutual Industries Inc., respondent herein, hereinafter called Company.

In essence, the Board issued a bargaining order after finding that (1) a majority of the employees of the Company had signed authorization cards intending to designate the Union as their bargaining agent; (2) that after request, the Company refused to bargain although the Company had previously signed a recognition agreement and (3) that the Company promised the employees a health insurance plan to discourage them from joining or adhering to the Union and that because of the foregoing the Company violated Section 8(a)(1) and 8(a)(5) of the act.

At no time was there every any finding of Union animous on the part of the Company. The evidence indicated that the Company suggested an election on several occasions; that the Company never refused to permit the Union organizers to come on to the Company premises to organize, and even permitted the employees of the Company to translate for the Union organizers [Tr. 250, lines 5 *et seq.*] and that the Company never made speeches, distributed pamphlets, spoke to employees or used any of the other devices usually employed by management in situations such as this.

Statement of Issues.

Respondent's position is that at least eight (8) of the Company's fourteen (14) employees did *not* sign authorization cards intending to designate the Union as their bargaining agent; that the Company never signed a recognition agreement; that it never bargained with the Union; that its refusal to bargain was based upon a good faith doubt as to the Union's majority; that it never committed an independent unfair labor act as required to prove lack of good faith; that it was at all times ready and willing to consent to an election and that it communicated such readiness and willingness to the Union and that, in any event, since there was no Union animous on the part of the Company and since the Company was spectacularly cooperative with the Union, a bargaining order should not have been issued—at most, if anything, an election should have been ordered.

The main issue in this matter is whether or not a majority of the employees of the Company, as of April 13, 1965 (the key date), signed authorization cards for the purpose of authorizing the Union to act as their bargaining agent. There are other issues in this matter such as: (a) Did the Company sign a recognition agreement? (b) Was the Company's refusal to bargain based upon a good faith doubt as to the Union's majority status? (c) Did the Company offer the employees an insurance program to discourage Union membership? and (d) Whether or not this is a proper situation for a Bargaining Order or should an election

have been ordered? Such other issues shall be considered in detail in this brief, however, it is quite clear that if the Union had not obtained signed cards for the majority of the employees, all other contentions of the Petitioner must fail. This must follow since an Order ordering the Company to bargain with a Union which does not represent a majority of the employees would violate the most basic premises of the law to the effect that a Union may represent employees only if a majority of said employees desire such representation. Section 7 of the National Labor Relations Act, hereinafter called Act, guarantees to employees the "right to self organization", the "right to bargain collectively through representatives of their own choosing" and "to refrain from any activities whatsoever". "In order to establish an unlawful refusal to bargain on the part of the employees, it is necessary to establish that the representative seeking to bargain has majority status—*that it was designated by a majority of the employees in the appropriate unit . . .*" emphasis added (Labor Law Guide, Paragraph 2413).

I.

A. The Board Erred in Finding That Eight of Respondent's Fourteen Employees Signed Authorization Cards Intending to Appoint the Union as Their Bargaining Agent. At Best Only Six of the Company's Employees Signed Cards With Such Intention and of That Six Only Three Testified.

The Trial Examiner found: . . . "when Spindler (Union organizer) presented to Meyers (Company employee) the Recognition Agreement, the respondent employed fourteen production and maintenance employees.

Of these, nine had signed cards authorizing the Union to act as its bargaining representative” [R. 23, lines 41-44]. “That on April 13, 1965, the Union had been designated by nine of the fourteen employees in the appropriate bargaining unit . . .” [R. 25, lines 6-8].²

As to one of the employees, Rose Kardaschian, whom the Trial Examiner decided had signed an authorization card intending to designate the Union as her bargaining agent the Board held as follows: “We do not pass on the Trial Examiner’s conclusion with regard to Kardaschian’s card . . .” [R. 36, note 1]. Thus the Board found that of the fourteen employees, although nine signed authorization cards, only eight intended to designate the Union as their bargaining agent. As will be shown hereinafter of those eight, two testified that they signed the cards based upon specific misrepresentation of the Union (M. Elias and E. Elias), three employees did not testify and the remaining three employees who testified indicated that they actually intended the card to be an authorization for the Union to act as their bargaining agent. Thus we see that at the very most six employees signed cards intending to designate the Union as their bargaining agent—the three who signed cards and did not testify and the three who did testify that they intended the Union to be their bargaining agent.

²R. 23, note 15 indicates that the employees who signed cards were M. Elias, Rodriquez, E. Elias, Jana Kardaschian, Hill, Bocage, Ustica and Thomas and that Benbow, Burga, Bushwar and Ross did not sign cards.

The following chart sets forth the names of the employees and their actions in regard to the authorization cards.

Employee's

1. A. Benbow	— Did not sign authorization card
2. I. Burga	" " " " "
3. C. Bushwar	" " " " "
4. R. Ross	" " " " "
5. L. Martinez	— Signed card after April 12, 1965
6. M. Elias	— Signed card based upon misrepresentation
7. E. Elias	" " " " "
8. R. Kardaschian	" " " " "
9. H. Rodriguez	— Did not testify
10. M. Hill	" " "
11. S. Thomas	" " "
12. T. Jana	— Signed card
13. C. Bocage	" "
14. A. Ustica	" "

14 employees

- 4 did not sign cards (Benbow, Burga, Bushwar and Ross)
- 1 signed card after key date (Martinez)
- 3 signed cards based upon misrepresentation (Kardaschian, M. Elias, E. Elias)
- 3 signed cards — did not testify (Rodriguez, Hill and Thomas)
- 3 signed cards to designate Union bargaining agent. (Jana, Bocage and Ustica)

B. Mario Elias Signed an Authorization Card, Not to Designate the Union as His Bargaining Agent, but Because He Was Told That the Union Needed His Signature to Speak to His Fellow Employees.

Mario Elias testified that when Spindler, Agent for the Union, requested that he sign an authorization card, Spindler told him that by signing the card Elias would be giving Spindler permission to speak to the other employees of the Respondent. In response to the questions of the attorney for the respondent, and the

questions of the Trial Examiner, Mario Elias testified as follows:

“Q. (Attorney for Mutual) Was Mr. Spindler there when you signed the card? A. Yes.

Q. Did you talk to him about signing the card? A. No. I went up there to tell him that I was giving a week's notice for Superior Bias Binding. Then he told me that he heard about the Mutual without no union and all that, and he gave me an authorization card, or whatever.

I, can't pronounce it, and he asked me to sign it for permission for him to go to the union. I signed it.

Q. Now, would you explain that to us a little more? He said for permission to go to the union?

A. Yes, to give him more authority to go to the Mutual Industries.

Q. To talk to the employer? A. Employees.

Q. He was looking for authority to talk to the employers or the employees? A. Employees—no, employers.

Q. People like you, did he want to talk to? A. Yes.

Q. He wanted to talk to people like you? A. Right.

Q. So what he was asking—don't let this worry you. We can't speak your language, so don't let it worry you. Is this a correct statement: He told you that if you signed this card this would give him permission to talk to the other workers in the plant? A. Yes, something like that.” [Tr. 97, lines 1-25].

“Trial Examiner: Let's clear this up.

Mr. Elias, did he say that the purpose of signing the card was to give him authority to talk to the bosses?

The Witness: No, to the workers.

Trial Examiner: Just the workers?

The Witness: Yes, to go in there—in other words, you know he couldn't go in—he told me that he couldn't go in there without permission that the workers wanted to see him. Something like that." [Tr. 98, lines 5-14].

"Trial Examiner: Now, when Mr. Spindler gave you this card to sign, did he tell you why it was necessary for you to sign it in order that he, Mr. Spindler, could go in to talk to the workers?

The Witness: Yes. Well, he said to have it signed so he could have more authority to go into the shop and talk to the workers there to join the union." [Tr. 104, lines 5-12].

"Trial Examiner: Thank you, Mr. Elias. You are excused. Just a moment, I think perhaps I want to ask you a question or two.

When Mr. Spindler asked you to sign the card—blue card that was shown to you, which was marked 'Authorization,' did he tell you why it was necessary for you to sign a card so he could talk to the other workers? Did he tell you anything like that?

The Witness: Make that Statement again.

Trial Examiner: If you don't understand me, you say so. I am going back to the time when he gave you that blue card which is identified as—what is the exhibit number?

Mr. Kreger: GC 3(i), Mr. Examiner.

Trial Examiner: General Counsel's Exhibit
3 (i). Do you see this card?

The Witness: Yes.

Trial Examiner: One that you signed?

The Witness: Yes.

Trial Examiner: Now, when Mr. Spindler gave you this card to sign, did he tell you why it was necessary for you to sign it in order that he, Mr. Spindler, could go in to talk to the workers?

The Witness: Yes. Well, he said to have it signed so he could have more authority to go into the shop and talk to the workers there to join the union.

Trial Examiner: Did he tell you why your signing the card would give him more authority to talk to the workers?

The Witness: That is what he said to me. Now, I read—I didn't sign it thinking—

Trial Examiner: I am not asking you what you were thinking. I am just asking what was said. Understand?

The Witness: Yes.

Trial Examiner: Did you read this card?

The Witness: I didn't even bother to read it.

Trial Examiner: Do you read English?

The Witness: Yes, I do.

Trial Examiner: Do you read Spanish?

The Witness: A little bit.

Trial Examiner: You read English, though?

The Witness: Yes.

Trial Examiner: You didn't read the card, though, did you?

The Witness: Not all of it.

Trial Examiner: What part did you read?

The Witness: 'Authorization Card,' right there.

Trial Examiner: That is all you read?

The Witness: Yes. I just took his word for it, I guess, for him to go over to the union.

Trial Examiner: Well, he didn't go over to the Union. He was in the union.

The Witness: I mean to go to Mutual Industries for Jack Spindler.

Trial Examiner: Did he say that he wanted to talk to Mutual Industries about anything?

The Witness: Well, he wanted to go in Mutual Industries Shop to talk to the workers there, and get cards signed like that.

Trial Examiner: I see.

O.K., I have no further questions, unless my questions have stimulated some?" [Tr. 103, 104, 105].

In spite of this *uncontradicted* testimony by an *employee*, the Trial Examiner finds that ". . . it is unrealistic to believe that Spindler told him (Elias) that he (Spindler) needed authorization cards in order to talk to the employees." [R. 24, lines 33 *et seq.*] What other testimony could be offered? What better testimony could be offered? Mr. Elias had no motive for distorting the truth. This cannot be said of all the other witnesses. Mr. Elias was, as the Trial Examiner points out, a Union member. His sympathies were obviously with the Union. Why is it unrealistic to believe that Spindler told Elias an untruth?

The Trial Examiner indicated that because Elias was a Union member when he signed the card and was once a committeeman for the Union and because he read *one*

word of the card—not the whole card—just one word on it, that it is unrealistic to believe, etc. [R. 24, lines 25 *et seq.*]. Mario Elias is not a grammarian. For a similar situation where the employee's ability to understand an authorization card is considered see (*N.L.R.B. v. Miller*, 341 F. 2d 870).

The Trial Examiner observes that Mr. Elias was familiar with the function of the union. In regard to that fact, Mr. Elias testified in response to questions propounded by the Counsel for the General Counsel as follows:

“Q. Did you ever hold a union position while you had been a union member, like committeeman, or anything like that? A. Yes, It was a small deal. It didn't last no more than two or three weeks, or something like that.” [Tr. 99, lines 5-8].

The Trial Examiner also seems to indicate that Mr. Elias understood the function of a business agent. This is obviously not so as Mr. Elias' testimony indicates.

“Q. (By Mr. Feinberg). Mr. Elias, while you were a member of the union, what did you believe Mr. Spindler's duties to be? A. Well he was our agent at the union. That is about all.

Q. Well, what was he supposed to do? A. Go over there and see us, how we are doing, he used to tell us—advise us what to do and what not to do.

Q. Did you ever hear him talk on behalf of a worker to the employer? A. I don't understand that.” [Tr. 107-108, lines 24 *et seq.*].

Mr. Elias did not know union people spoke to management. He thought union representatives only spoke to employees.

It is clear that Mr. Elias was told, and he believed, that he was signing the card so that Spindler could speak to the other employees. He did not intend to designate the union as his bargaining agent.

As is said by District Judge Timbers in his concurring and dissenting opinion in the case of *N.L.R.B. v. Gothan Shoe*, 359 F. 2d 684, at page 698.

“ . . . largely unfamiliar with NLRB procedure, they (employees) could hardly be expected to know, for example, that if enough of them signed cards ‘to get an election’ or ‘to get a vote’ . . . there very well might not be an election or a vote.”

C. Eloy Elias Signed the Authorization Card Not to Designate the Union as His Bargaining Agent but Because He Was Told That the Reason for the Card Was That the Union Wanted to know the Number of Respondent's Employees.

The Trial Examiner found that Eloy Elias signed an authorization card for the purpose of designating the Union as his bargaining agent [R. 24, lines 53-55], despite the testimony of the employee which indicates that Mr. Spindler was once again guilty of misrepresentation. The pertinent section of Mr. Elias' testimony reads as follows:

“Q. (By Mr. Benjamin) Did he say anything else to you as to what it meant? Did he tell you? A. Yes, he read it to me.

He says, ‘This card doesn't mean anything. We just like to know how many people are going to

be in the shop, so we could form a union.' That is all he said, and I signed it." [Tr. 114, lines 11-17].

"Trial Examiner: The other gentlemen that is not here. Did he say as to what it didn't mean anything?

The Witness: He said, 'This card doesn't mean anything. We just like to know how many people are going to be in here so we can keep other names, and we will establish a union—see if we can get a union.'

Trial Examiner: Did he say where he wanted you to sign the card?

The Witness: Just like I said. That is the way he told me. Just like to know how many people have in the shop, so we can form a union." [Tr. 115-116, lines 16 *et seq.*].

What other or better evidence could have been adduced? What other or better witness could have so testified? Eloy Elias, an employee, a union member, testified that he was told that the union wanted his signature to determine the number of employees in the shop. That testimony is *unrefuted* and *uncontradicted*, and the Trial Examiner finds that his testimony should not be credited. Respondent respectfully suggests that the decision of the Trial Examiner is not based on "substantial evidence".

D. The Board Erred in Finding as a Matter of Law, That Even if an Employee Signs an Authorization Card Based Solely on a Misrepresentation That Such Card Is Valid Unless the Employee Is Told That Such Misrepresentation Is the Sole Reason for the Card. The Rule Is That a Card Obtained by a Lack of Candor May Be Valid but a Card Obtained by a Misrepresentation Is Not Valid.

The Trial Examiner held as follows in respect to the authorization cards of Mario Elias and Eloy Elias:

“ . . . In any event assuming *arguendo* that Elias was testifying correctly as to what Spindler told him, it is apparent that Spindler did not tell him (Mario Elias) that this was the sole purpose of the card. Absent such limiting representation it is well settled that the card was a valid authorization.”

“The foregoing principals apply with equal force to the authorization card signed by E. Elias.” [Tr. 8, lines 36-46.]

The cases cited by the Trial Examiner in support of that statement stand for the proposition that where an authorization card is signed based on the statement of the Union Agent that the *sole* purpose of the card is to obtain an election, the card is invalid, but where the fraud consists of telling the employee that *one* of the purposes of the card is to obtain an election, the card is valid. The rule, although much criticized and much reviled, does seem to state the current law (*N.L.R.B. v. Gotham Shoe Manufacturing Company*, 359 F. 2d 684 (C.A. 2).)

The rationale of that rule is that when an employee is told that *one* purpose of the card is to get an election, he has *not* been told a lie. To get an election *may* be one of the reasons for having a card signed. But when a Union representative tells the employee that the *sole* reason for the card is to obtain an election, he has told a lie—the Union can use the card for other purposes.

In the dissenting opinion of the District Judge Timbers in *N.L.R.B. v. Gothan Shoe, supra*,

“To refrain from affirmative deception is not enough: the responsibility of furnishing specific relevant information to enable employees who are solicited to make an informed decision should be squarely on the Union and the burden of validating Union representation cards should be commensurate with that responsibility”.

In the instant situation, the cards were signed on the basis of out and out misrepresentations. Does the Board advance the rule that a Union Agent may go to any length to deceive the employee so long as he does not affirmatively tell him that the sole purpose of the card is to obtain an election? Certainly not. As is said by Judge Learned Hand in (*N.L.R.B. v. Dadourian Export Corp.*, 138 F. 2d 891 (892)) “Fraud vitiates consent as well as violence . . .”

The rule is that the Union must at least refrain from outright and affirmative fraud, and that cards based on such outright and affirmative fraud are invalid. In this case, neither of the Elias' were told, nor did they know, that the purpose of the cards was to authorize the Union to represent them—they were told, and they believed, specific misstatements of fact.

The cards were signed based on the fraud of a Union representative and by signing the card, the employees have not "clearly manifested an intention to designate the union as the bargaining representative" and should be held invalid for that purpose.

E. One Illiterate Employee (Rose Kardaschian), Who Had No Conversation About the Card, Signed a Card Which Was Solicited by Her Foreman — Without Understanding It and Without Intending It to Constitute a Union Designation.

Another employee who signed an authorization card was Rose Kardaschian, about whom the Board refused to make a decision. Employee Kardaschian spoke only Russian and testified through an interpreter as follows:

"Q. (By Mr. Benjamin) Did you speak to anyone at the time you signed the card about the card? A. There was no conversation whatsoever. He gave me the card. I signed it, and that was all" [Tr. 196, lines 6-9].

"A. She did assist me in filling this out. However, the foreman (Tony Elias) on previous occasions have often given me cards and not explained what they meant. I just continued to sign them and give them back to him." [Tr. 196, lines 21, to 24].

"Q. Did you also tell him that the Union man—I withdraw the question. What did you do with the union card after you signed it? A. I gave it back.

Q. To whom? A. I gave it to Tony, (foreman) and he forwarded it.

Q. You gave it to Tony?" [Tr. 194, lines 16-22].

"Q. You gave it to Tony, or to the union man?

A. I gave it to Tony." [Tr. 195, lines 2 and 3].

It is clear from the testimony of the witness that she (1) was never told what she was signing; (2) could not read the card she signed; (3) is unclear as to whom gave the card to her; (4) returned the card to the foreman; (5) signed the card because she often signed cards her foreman gave her, not for any specific reason.

The case of *Hecks, Inc.*, 156 N.L.R.B. 760 provided that the participation of a foreman in the solicitation or organizational efforts of a Union may taint the entire card showing.

Trial Examiner, Maller, held as follows:

"Hecks, Inc. does not support respondent's position as she was not solicited by the foreman. To the contrary Spindler (Union Agent) testified creditably that he obtained Kardaschian's signature". [R. 24, lines 65 *et seq.*]

Respondent respectfully observes that Mr. Spindler did not testify that he "obtained" Mrs. Kardaschian's signature on General Counsels 3(J). He only testified that he was present when the card was signed. [Tr. 39, lines 19 *et seq.*] There is no evidence as to who obtained Mrs. Kardaschian's signature. The only evidence we have is the fact that her foreman often gave her cards to sign which she did not understand. However, we are quite clear as to whom she returned the card. She returned the card to her foreman. She believed she was signing the card for her foreman. The theory of the

Heck case cannot be disregarded. It is specifically applicable in this situation.

The Trial Examiner says that “in any event . . .”, which must mean that even if the foreman did participate in the solicitation of the signature, “. . . there is nothing in her testimony which would overcome the presumption of validity flowing from the authorization which appears on the face of the card.” [Tr. 9, lines 1-5]. It is submitted that all of the employee Kardaschian’s testimony serves to overcome the presumption of validity.

The Board did not take a position as to Kardaschian’s card [R. 36, note 1].

F. Three Employees Who Allegedly Signed Cards Did Not Testify and Therefore Their Cards Should Not Be Counted.

Employees Rodriguez, Hill and Thomas did not testify. Since the representatives of the Union made serious misrepresentations to employees and since the foreman solicited the signature of another employee and since many of the employees of Respondent did not speak English, it is only fair to assume that the Union used similar faulty methods to obtain the signatures of the three employees who did not testify.

It is well established law that the burden of proving that a majority of the employees have designated the union as their bargaining agent is on the General Counsel.

“Where the General Counsel seeks to establish a violation of Section 8(a)(5) on the basis of a card showing he has the burden of proving . . . that a majority of employees in the appropriate union

signed cards designating the union . . .” *John P. Serpa*, 155 N.L.R.B. 99, 1965. Although this case was reversed and remanded in *Retail Clerks Union No. 1179 v. N.L.R.B.* (March 28, 1957—C.A. 9—No. 20,781) the court affirmed the fact that the General Counsel has the burden of proving not only a majority but also the employers bad faith.

In the case of (*N.L.R.B. v. Peterson Brothers, Inc.*, 342 F. 2d 221 at 224 (1965)) the court found that:

“ . . . there was a burden on the General Counsel to establish by a preponderance of the evidence that the signor of the card did, in fact, what he would have done by voting for the union in a board election.”

In the *Peterson* case, this finding was based on the fact that the wording on the authorization card was ambiguous. In the instant situation, the General Counsel should bear the same burden—that is the burden of proving by a preponderance of evidence the subjective intent of the signor at the time of the signing—for the reason that there is substantial evidence indicating that several of the employees who signed cards could not read or speak English and that the Union’s representatives not only failed to explain to them what they were signing but actually were guilty of direct and outright misrepresentations.

As is indicated in the Brief for the National Labor Relations Board, “The law is settled that authorization cards may be authenticated by a witness to the execution” (citing cases). However, there is more to that rule of law. It is also clear that there must be no

reason to preclude acceptance of the witnesses testimony. The witness must be trustworthy. In the case of *Economy Food Center, Inc.*, 333 F. 2d 468, 471 (C.A. 7) the Court indicated as follows:

“The signatures on the cards of the two employees absent at the time of the hearing, were authenticated by Union representative Goss, who testified that both cards were signed in his presence and that he witnessed each signature. *In view of the fact that no reason appears in the record to preclude acceptance of Goss’ testimony as determining the authenticity of the cards, we can not say that the finding of the Board was not justified.*” (Emphasis added).

In the instant situation there is much reason to preclude acceptance of the testimony of the witness as determining the authenticity of the cards. As has been seen by much of the foregoing, the testimony of the Union’s witnesses has often been in direct conflict with the testimony of the employees. That is reason enough.

G. Conclusion.

From all of the above, we see that the Union did not have a “clear majority” by any means. Even if the three cards of the nontestifying witnesses are counted, there were still only six employees who signed cards intending to designate the Union as their bargaining agent. Those six consist of the three who did not testify (Rodriguez, Hill and Thomas) and Jana, Bocage and Ustica. In the instant situation a majority would require eight of the fourteen employees

to have signed an authorization card with the intention of designating the Union to act as their bargaining agent. Seven such cards would not be sufficient "A designation by 50% of employees is not sufficient. The Union must have a majority 'signed up'" *Martin Theatres of Georgia*, 126 N.L.R.B. No. 1054.

II.

The Board Erred in Finding That the Respondent's Refusal to Bargain Was Not Based Upon a Good Faith Doubt.

"Ordinarily when faced with a Union's demand for recognition on the basis of signed authorization cards, an employer may lawfully insist on a Board election to establish the Union's majority status unless such insistence is a ruse to gain time. Whether the insistence on election is proper or improper depends on finding as to whether doubt is in good faith or not." (*Joy Silk Mills*, 185 F. 2d 732, 741; *Gem City Mattress*, 136 N.L.R.B. 1317).

It is not an unfair labor practice for an employer to refuse to bargain with a representative of his employees unless he knows that representative has been designated by a majority of his employees. Actual uncertainty as to the representative's majority status excuses the employer from bargaining. *France Foundry & Machine Co.* (1943), 49 N.L.R.B. 122.

It is a well established rule of law that the General Counsel has the burden of proving the employer did not have a "good faith" doubt as to majority status of

the Union (*John P. Serpa, supra*). Chariman McCulloch citing the *Serpa* case in a speech reported in 60 B.N.A. L.R.R. 150 said:

“ . . . the Board as a matter of general practice dismisses charges against employers when the General Counsel fails affirmatively to prove that the refusal was not based upon a ‘good faith’ doubt of the Union’s majority.”

In the instant situation, Dave Meyers, the Los Angeles plant manager, testified that he did not believe the Union represented the majority of the employees either before April 13th or after April 13 or at the time of the hearing [Tr. 256, lines 17 *et seq.*]. He testified that he doubted the Union’s majority status because of conversations he had with the plant foreman, Anthony (Tony) Elias, who informed him on many occasions that he did not think that employees wanted the Union. Their foreman, Anthony Elias, who was fired by Meyers in October, 1965 [R. Tr. p. 266, lines 12 and 13] testified that he told Meyers that “. . . there were several (employees) there that didn’t want the Union.” [Tr. 238, lines 16 *et seq.*]. Meyer testified that he told the Union representative a number of times that he doubted that the Union represented a majority of the employees and [Tr. 335, to 337, lines 18 *et seq.*] that he made that observation to Spindler both before and after April 12, 1965 [R. Tr. p. 336, lines 6 *et seq.*].

The Trial Examiner and the Board brushed all of the above testimony aside as “flimsy evidence” on which to base a good faith doubt as to the Union’s majority [R. 26, lines 4-6].

Thus, we see that neither the Trial Examiner nor the Board attempted to ascertain whether respondent actually had a good faith doubt. They looked only at the question as to whether the respondent should have had a good faith doubt. The question is not—Did the Company have enough evidence to support a good faith doubt?—The question is—Did the Company actually have a good faith doubt?

As we have seen above, the General Counsel has the burden of proving that the refusal to bargain was not based upon a “good faith” doubt of the Union’s majority. In the instant situation, the Board seems to have transferred the burden of proving the good faith doubt to the respondent.

A. There Can Be No Finding of Good Faith Doubt Without the Finding of an Independent Flagrant Unfair Labor Act.

It is clearly the law that there can be no “good faith doubt of majority” without the showing of an independent violation of the act. As said by member Howard Jenkins in *Aaron Bros.*, 158 N.L.R.B. 108.

“Thus, the concept of “good-faith doubt of majority”, whatever its relevance in other types of Section 8(a)(5) violations, has become irrelevant to the decision of cases of this type, where the employer rejects the card showing but engages in no violations of the Act, no undermining of the Union, no interference with the employees’ freedom of choice, and does not otherwise exhibit bad faith.”

As will be seen hereinafter, there was no independent unfair labor act committed by the Company.

The Board adopted the Trial Examiner's testimony that the Company offered the employees a medical plan to discourage the employees from joining the Union [R. 26, lines 59-62].

The only reason that this could be important is to indicate to the Board that the Company did not have a "good faith doubt" and to provide the reason for the issuance of a Bargaining Order.

It is well established that (1) there must be an independent unfair labor practice at the time of the refusal to bargain and (2) that independent violation must be flagrant, not "de minimis" and (3) have been made with the object in mind of destroying the Union's majority. *Hammond and Irving*, 154 N.L.R.B. 1071.

In that case, the employer questioned six employees out of 110 or 111 employees. The court held at page 1071 as follows:

"While unfair labor practices committed on or about the time of an employer's refusal to bargain often demonstrates the bad faith of the respondent's position, *not every act of misconduct necessarily vitiates the respondent's good faith*. For there are situations in which the violations of the Act are not truly inconsistent with a good faith doubt that the Union represented a majority of the employees. Whether the conduct involved reflects on the good faith of the employer requires an evaluation of the facts of each case." (Emphasis added).

The reason, for the requirement of an independent flagrant unfair labor practice to indicate sufficient bad faith to issue a Bargaining Order, is that a Bargain-

ing Order is “strong medicine depriving both employer and employees of their rights” *N.L.R.B. v. Flomatic*, 59 LRRM 2539 and that unless an employer is engaging in activities which “have made a fair and free election impossible . . . (or which) . . . evidences a rejection of the collective bargaining principle . . .” (60 B.N.A. L.R.R. 150) such an order should not issue. The flagrant independent unfair labor practice is needed to prove that such a state of affairs exists. Mere refusal to bargain is not so heinous a crime to require a bargaining order.

Because of the above described state of the law, even assuming *arguendo* that it is found that on April 13, 1965, the Union represented a majority of the employees, there is still insufficient evidence to find a violation of Section 8(a)(5). Without the independent flagrant violation the General Counsel cannot sustain the burden of proving the lack of good faith. (*Aaron Bros., supra*).

B. The Board Erred in Adopting the Trial Examiner's Findings That the Company Committed an Independent Unfair Labor Act.

It thus becomes important to determine whether the finding that the Company committed an unfair labor act (offered a medical plan) is supported by the evidence and if it is proved that a medical plan was offered to the employees was it so reprehensible as to make a fair and free election impossible.

Of the fourteen employees of the Company as of April 13, 1965, only eight testified at the hearing. Of these eight only two were asked any questions in regard to the alleged offer of medical insurance. One of said employees was Mario Elias who testi-

fied that all that was done was the collection of statistics. He responded to a question as to his understanding as to who was going to pay for the insurance as follows: "A. Let me see. He didn't discuss nothing to us. All he wanted, some information about dependents, our names, and that was it." [Tr. 246, lines 9-11].

The other employee who was questioned as to a medical plan was A. Ustica. She testified that her foreman spoke to her in relation to a medical plan and testified that she understood that the employee was to pay the premiums [Tr. p. 232, lines 1-10].

Four other employees, *who were not employed as of April 13, 1965*, were called as witnesses. Of those four, one was not questioned as to the issue, one testified that only statistics were gathered, one testified that he was told the employee would pay for the insurance and one testified that she was not spoken to in reference to insurance.³

Of the twelve employee witnesses who appeared in this matter only one, Danny Estrada, who was hired after April 12, 1965, testified that the Company actually offered him anything. It is interesting that Danny Estrada is unquestionably the employee whose testimony was most clear in regard to his desire to be represented by the Union. It follows therefore that the only results that respondent achieved by their alleged unfair labor practice was to induce Mr. Estrada to "join the Union".

³See chart Exhibit A.

All in all, of the twelve employees to testify, six were not questioned at all, as to a medical plan, an extremely revealing fact, one testified that no one ever discussed a medical plan with her, two testified that only statistics were gathered, two indicated that they were told that the employees were to pay for the plan and one testified that he was told that the employer would pay for the plan.

It is this one state of affairs which the Board relied on, in essence the testimony of only one of twelve testifying employees, to find that the Company made a "fair and free election impossible" and evidences a rejection of the bargain principal. This finding is very obviously without merit and not based upon a substantial portion of the evidence as required by the law as enunciated in the case of (*American Ship Building Company v. National Labor Relations Board*, 380 U.S. 300). The wrong, if any there was, was "de minimus".

It should also be noted that there is no evidence that the employer rejected the collective bargaining system. As a matter of fact, a Union organizer, testified that the attorney for the respondent requested that there be an election and indicated that "he would see to it that we had a fast election" [Tr. 163, lines 15 *et seq.*]. The Vice-President of the Company also testified that "(he) was willing to have an election, was willing last week, the month before and the month before." [Tr. 380, lines 1-5].

III.

A Bargaining Order Is “Strong Medicine” Based on a “Notoriously Unreliable Method of Determining Majority Status” Which Should Be Issued in Only the “Most Flagrant Situations” and Is Therefore Not Appropriate in the Instant Situation.

“Now everyone knows . . . that honest and free elections are a better test of employee choice than authorization cards”.

The above statement was made by Chairman McCulloch in his speech reported at 60 BNA LRR 150.

The Board has held that authorization cards are a “notoriously unreliable method of determining majority status of a union . . .” (*Sunbeam Corp.*, 99 N.L.R.B. 546 at pp. 550 and 551).

Chairman McCulloch points out that although the authorization cards are unreliable they do have some purpose.

“Where an employer’s unfair practices or interference have made a fair and free election impossible, and where his conduct evidences either such a rejection of the collective bargaining principle or such an effort to undermine the union’s majority as to show he had no good faith doubt about it, it is reasonable to go back to the cards to determine the choice of the majority.”

It is obvious from the above that Chairman McCulloch believes that the only situation in which it is reasonable to “go back to the cards to determine the choice of the majority” is when the employer has been guilty

of some flagrant abuse of the law. Using this criteria there can be no question that in the instant situation the employees' choice should be tested by the better method namely secret elections rather than by a show of cards.

Here the employer is *not* one who has done everything in its power to undermine the Union or whose actions evidence a rejection of the collective bargaining principle. Here the Respondent has been spectacularly cooperative. The Union representatives have been allowed free access to the plant's premises and employees. No Union representative was ever denied permission to come on to the premises or to speak to an employee. As a matter of fact, Union representatives were permitted to use one employee to translate for another [Tr. 250, lines 5 *et seq.*]. The Respondent did not make speeches, distribute pamphlets nor use any of the tricks it had available to it, and Meyers testified that he never discussed the Union with any employee other than his foreman Anthony Elias [Tr. 281, lines 1 *et seq.*].

All of the above testimony is unrefuted. Respondent has always been ready to consent to an election so that the actual choice of the employees might be determined by a secret ballot.

However, the Union is not willing to permit the employees to make their decision by a secret ballot. It insists upon a bargaining order.

"A bargaining order . . ., is strong medicine. While it is designated to deprive employers of a chance to profit from a stubborn refusal to abide by the law (Citing Cases) and although it undoubtedly operates to deter employers from adopt-

ing illegally intrusive election tactics, its potentially adverse effect on employee's Section 7 rights must not be overlooked. (Citing Cases) That Section protects the rights of employees to join or refrain from joining a labor organization and that right is implemented by Section 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret ballot there is the possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees." (*N.L.R.B. v. Flomatic*, 347 F. 2d 74 at page 78).

The basic concept which is evolving is that bargaining orders being "strong medicine" should be used with restraint (*N.L.R.B. v. Johnnies Poultry Company*, 344 F. 2d 617).

"The argument for restraint seems even more compelling since the Board's decision in the Bermel Foam Products Co., Inc." (*N.L.R.B. v. Flomatic Corp.*, *supra*).

One writer even goes so far as to advocate that a bargaining order should only issue in cases involving serious violations such as discriminatory discharges or clear threats of retaliation. Bok, "*The Regulation Of Company Tactics In Representation Elections Under The National Labor Relations Act*, 78 *Harvard Law Review* 38 at p. 138 (1964)."

In the instant situation there is no reason to substitute a bargaining order for a secret election. Absolutely no evidence has been adduced which would indicate that such a substitution is necessary.

IV.

The Board Erred in Finding That the Company Recognized the Union and Negotiated With It.

A. An Employer May Not Recognize a Union Which Does Not Represent a Majority of Its Employees.

The Board adopted the Trial Examiner's findings to the effect that the respondent signed the document, General Counsel's Exhibit 4, with the intention that it be considered a Recognition Agreement.

Assuming *arguendo* that the Company did sign a recognition agreement and did negotiate with the Union, it would still not suffice to permit a bargaining order to issue, since the Union did not have the majority of the employees.

An employer may not recognize a Union which does not represent a majority of its employees. (*Lively Photos*, 123 N.L.R.B. 1054; *Winn and Lovett*, 115 N.L.R.B. 1676); N.L.R.A. Section 8(a) (2).

The Board, in its opinion cites the (*Greyhound Terminal* case, 37 N.L.R.B. 87 enfd, 314 F. 2d 43) for the proposition that a refusal to bargain with a Union after recognizing and bargaining with it is a violation of Section 8(a)(5). The *Greyhound* facts are substantially different from the facts in the instant situation. In the *Greyhound* case there was no question that the Union had a majority of the employees. In the instant case it is quite clear that the Union did not have the majority of the employees.

The basic fact is that if the Union did not have a majority of the employees on April 13, 1965, even if the document [General Counsel's Ex. 4] was a recognition agreement and even if the Company did bargain

with the Union, it cannot be the basis for a bargaining order since that would be forcing a Union on employees who do not desire that Union.

On the other hand, even if the Union had a majority of the employees, the question as to whether or not the Company signed a recognition agreement or bargained with the Union will be important. It will go to the question as to whether the Company did or did not have a good faith doubt. It is the Company's position that it did neither.

B. The Respondent Did Not Recognize the Union as the Bargaining Agent for Its Employees.

It is agreed by all parties that the respondent's employee Meyers signed the document introduced into evidence as General Counsel's No. 4. However, it is respondent's position that in order for the document to be a binding recognition agreement it is necessary (1) that the Union have a majority of the employees and that (2) the document be signed by a properly authorized agent of the respondent with (3) knowledge of its meaning and (4) with an intent to recognize the Union.

Thus, assuming *arguendo* that the Union had a majority of the employees, the following two questions must both be answered in the affirmative before the document can constitute a recognition agreement:

- (A). Did Meyers understand what he was signing?
and
- (B). Did Meyer have the authority to sign the document?

C. Meyers Signed the Alleged Recognition Agreement
Based Upon Spindler's Misrepresentation.

As to the first question (Did Meyers understand what he was signing?) there is a conflict of testimony Spindler testified that he brought the document to Meyers at the plant; that Meyers read the contract and signed it; that there was not much conversation at the time and that he and Meyers were alone at the time of the signing [Tr. 36, lines 3 *et seq.*].

Meyers on the other hand indicated that he met with Spindler on the 12th or 13th of April, 1965; that the meeting was in Meyers' office and that a fellow employee, Norman Gross, was present [Tr. 258, lines 16 *et seq.*]. Meyers testified on direct questioning as follows:

"Q. And what did you say to him—I mean, what did you say to Mr. Spindler, and what did he say to you? A. I was sitting at the desk, and Mr. Spindler came into the office. He handed me a piece of paper, and he asked me to sign it.

I took the paper in my hand and glanced at it, looked at it, and asked Mr. Spindler what was this all about.

He says, 'All it means, Dave, is that we are the first union to come in here.'

I said, 'Are you sure this is all it means?' He says, 'Yes.'

I said, 'In that case, I don't see any objection to signing it.'

"Q. And did you sign it? A. Yes, sir." [R. Tr. 258, lines 16 *et seq.*].

Mr. Gross testified on direct questioning as to the situation as follows:

“Q. Would you tell us about your second meeting? A. I think that was in my office. Mr. Meyers and I were discussing some type of business, and Mr. Spindler came in. He had a form which he asked Mr. Meyers to sign.

Q. Could you tell us, if you remember, to the best of your recollection, the conversation? You know, what he said and what you said, if you can. If you can't, don't. A. Well, I don't remember very much. I know he had a form, and he gave it to Mr. Meyers to sign.

Mr. Meyers look it over. I think he asked Mr. Spindler what the form was.

Mr. Spindler said, ‘It shows that we were the first union to contact you people.’

Mr. Meyers signed it, and he asked Mr. Spindler was that all it meant. That was pretty much the end of it.

“Q. Did Mr. Spindler leave at that time? A.

Yes, as far as I know.” [Tr. 350, lines 15 *et seq.*].

The question may well be asked at this point—why did Meyers sign a document which, when understood, is clearly a “recognition agreement” if he did not intend to recognize the Union. The answer is obvious. Meyers did not understand what the document meant. Meyers is not a lawyer, he has very little experience in labor matter [Tr. 327 and 328]. He is an ingenuous man who believed that which Spindler told him. He believed he was making a statement of fact, to wit, that

this particular Union was the Union that first attempted to organize the plant.

There can be no question that Meyers was careless. He should not have signed a document he did not understand. However, he signed it based upon Spindler's representation. It is very important to remember that if, a bargaining order is entered based upon Meyers' carelessness, the employees will be forced to join and pay dues to a union which was not selected by a majority of them and the employer will be forced to bargain with a union that does not represent a majority of its employees. Two of the major reasons underlying the National Labor Relations Act would, therefore, be ignored.

The law in matters of this nature is as follows:

"If the fraud goes to the inception or the execution of the (document), so that (signor) is deceived as to the nature of his act . . . or does not intend to enter into a contract at all . . . (the document) is void." *Witkin's Summary of California Law*, Vol. 1, p. 150.

"Where the failure to familiarize oneself with the contents of a (writing) prior to its execution is traceable . . . to carelessness or negligence . . . where such failure . . . is induced . . . by the false representations and fraud of the other party, the court, even in the absence of a fiduciary relationship should reform . . . the instrument . . ." *Witkin's Summary of California Law*, Vol. 1, p. 151.

D. The Alleged Recognition Agreement Is Not Binding Upon Respondent Because Respondent's Employee Meyers Did Not Have the Authority to Enter Into Said Agreement.

Meyers did not have the actual authority to negotiate or execute any agreement whatsoever [Tr. 361, lines 3-6; Tr. 348, lines 11 *et seq.*]. Mr. Meyers told the Union representative that he had no authority [Tr. 250, lines 25 *et seq.*].

Assuming *arguendo* that Meyers signed the document knowing what he was signing—the document still cannot be binding on the Respondent since Meyers did not have the authority to sign it and since the applicable rule of Agency is as follows:

“No liability is incurred by the principal for acts of the agent beyond the scope of his actual or ostensible authority, *and a third party who deals with an agent and knows of the agency is under a duty to ascertain the scope.* Hence, if the agent acts beyond his actual authority and the conduct of the principal has not been such as to give him ostensible authority, the principal cannot be held.” (Emphasis added).

Witkin's Summary of California Law, Vol. 1, p. 417.

Mr. Schwartz (Union Agent), who testified that he met with Mr. Dunn in Philadelphia on June 27, 1965, testified that on such date he said to Mr. Dunn, “I was informed by the Union in Los Angeles that the plant manager does not have authority to negotiate the agreement.” [Tr. 179, lines 16-18]. We, therefore, see that on June 27, the Union knew that Meyers did not have authority in this matter.

The testimony of Mr. Schwartz [Tr. 172, lines 24-25] indicates that Mr. Schwartz knew on July 6th that Meyers had no authority to sign a document. The record is replete with testimony of all of the parties who testified in this matter that they knew that Meyers called Dunn constantly and that Dunn made all the decisions. We know that there was no actual agency and from a review of the facts, it becomes clear that there was no ostensible agency.

The Trial Examiner found [R. 25, lines 49-52] that Meyers had ostensible authority to receive the Union's request for recognition and to act thereon, citing (*James Thompson & Company, Inc.*, 100 N.L.R.B. 456, 462 enforced in part 208 F. 2d 743 (C.A. 2); (*Rural Electric Company, Inc.*, 130 N.L.R.B. 799, 801-802 enforced in part 296 F. 2d 523 (C.A. 10)). In neither of these cases are the words "ostensible agency" used. In both cases the Union called the company's manager and asked him to recognize the Union. In both cases, the manager refused. It seems that what the Trial Examiner and the Board have done is find that since two managers in two different cases had ostensible authority to indicate an unwillingness to negotiate, that all managers in all cases have ostensible authority to recognize a union. The difference between an indication of unwillingness to negotiate and the recognition of a union is great. The facts of each individual case must be carefully scrutinized. The instant situation is one in which the manager had no authority, ostensible or otherwise, to deal with the union in any way whatsoever.

V.

**Respondent Did Not Negotiate With the Union—
Discussions With the Union Were Information
Seeking Not Negotiating.**

The Trial Examiner found that the Company negotiated with the Union. The Board adopted that finding. In one breath, the General Counsel alleges a violation for failing to negotiate and bargain and in another breath, it is argued that the Company did negotiate. It is clear that the Company did not negotiate but was merely seeking to obtain information expecting an election.

Dunn and Meyers believed that the only way a union could be recognized was by a secret election [Tr. 37, lines 23 *et seq.*] and it was expected that a petition for such an election would be forthcoming soon. Dunn testified:

“Q. Now, did you ever receive from the union a form contract such as General Counsel’s Exhibit 5? A. Yes, I did.

Q. Did you read it carefully? A. I read it very carefully.

Q. Why did you read it carefully?

The Witness: I read it very carefully, because after receiving it, I felt that there would be a petition for an election, and I thought it in my best interest to read it carefully to know what type of position I should take when that time arose.” [R. Tr. p. 357, lines 11-16 and 20-23].

“However, I was interested in getting information inasmuch as at this point I was fairly certain that there would be a petition for an election.” [Tr. 360, lines 17-19].

Dunn's entire testimony is replete with references to the election which he believed was indispensable and inevitable.

Conclusion.

In conclusion the Petitioner respectfully submits that by reason of the matters set forth herein the Findings, Conclusions, Decisions and Order of the National Labor Relations Board should be set aside, vacated and annulled.

FINK, WARSHAW & BENJAMIN,
By HAROLD H. BENJAMIN,
Attorneys for Mutual Industries,
Respondent.



Certificate.

I certify, that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

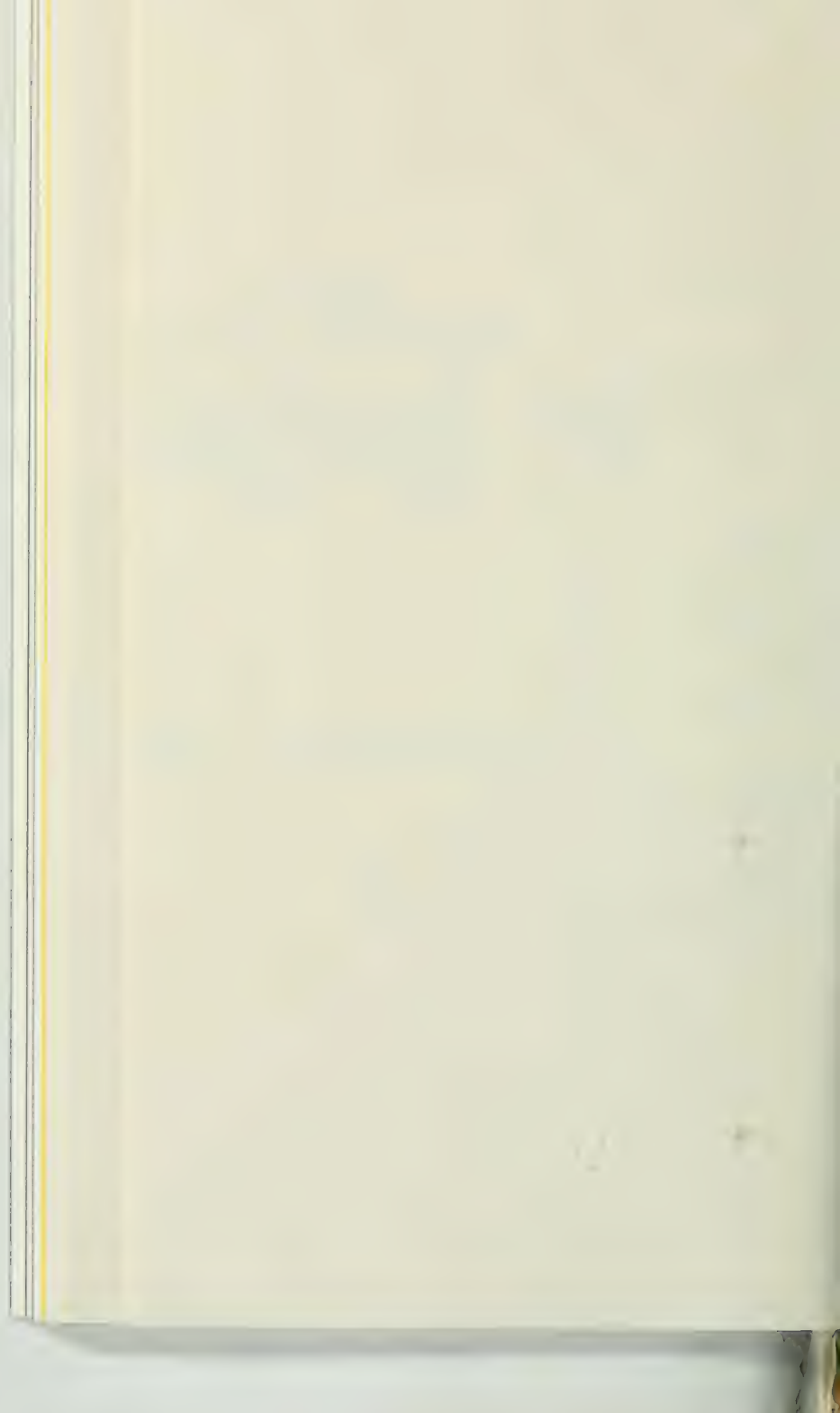
HAROLD H. BENJAMIN,
Attorney for Respondent.



EXHIBIT A.

Employees Prior to April 12, 1965.

EMPLOYEE	No. 1 Did not testify as to medical insurance	No. 2 Testified that no one ever discussed medical insurance with him	No. 3 Testified that he was told employer would pay for medical insurance	No. 4 Testified that he was told employer would pay for medical insurance
BOCAGE	X			
M. ELIAS (Tr. 246)				
LARA	X			
KARDASCHIAN	X			
E. ELIAS	X			
JANA	X			
USTICA (Tr. 232)				
MARINEZ	X			
EMPLOYEES SUBSEQUENT TO APRIL 12,				
ESTRADA (Tr. 74)				
JASSO (Tr. 232) (Tr. 246)			X	
FAIRFIELD (Tr. 246)				
GUERRERO (Tr. 241, lines 21)		X		



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT LESSARD,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

No. 21513 ✓

APPELLEE'S BRIEF

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FILED

JUN 19 1967

WM. B. LUCK, CLERK

JUN 21 1967

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE^{1/}

On June 8, 1961, Albert Lessard was indicted by the Grand Jury of San Francisco and charged with the murder of Joseph Mazeski. After a trial by jury, he was found guilty of murder in the first degree and sentenced to death. His motion for a new trial was denied on December 28, 1961.

The California Supreme Court affirmed the trial court's decision on September 27, 1962. On December 17, 1962, Lessard petitioned that same court for a writ of habeas corpus, alleging as grounds therefor: (1) an illegal search and seizure, and (2) juror misconduct. His petition was denied without hearing on January 3, 1963.

On January 10, 1963, Lessard petitioned the United States Supreme Court for a writ of certiorari. Eight days later, Mr. Justice Douglas granted a stay of execution pending consideration of the petition. On March 25, 1963, the petition was denied and the stay of execution set aside.

On May 14, 1963, Lessard petitioned the United States District Court for a writ of habeas corpus. In addition to the search and seizure and juror misconduct grounds which had been earlier alleged in the state courts,

1. The facts of this case are well summarized in: (1) The decisions of the California Supreme Court following petitioner's automatic appeal (People v. Lessard, 58 Cal.2d 447 (1962), and with respect to his petition for writ of habeas corpus therein (In re Lessard, 62 Cal.2d 497 (1965)); (2) the opinion of the United States District Court below and (3) the records and files presently lodged with this Court herein.



he also raised three new grounds: (a) violation of his right to be present at all stages of the trial proceedings: (b) that the prosecution knowingly suppressed material evidence: and (c) that the prosecution knowingly presented perjured testimony. On May 20, 1963, the petition was denied without prejudice and a motion for a certificate of probable cause was granted. In the following appeal, and on May 23, 1963, this Court granted a stay of execution and remanded the case to the United States District Court with the accompanying order that the case was to be held until Lessard had secured a determination of the new issues raised in the appropriate state courts.

On October 1, 1963, after unsuccessfully seeking habeas corpus in the Superior Court of Marin County in July, 1963, Lessard sought habeas corpus in the California Supreme Court alleging the same five grounds. That court issued an order to show cause on December 6, 1963. Thereafter, on February 5, 1964, a reference hearing was ordered on the three new issues, with Lilburn Gibson appointed as referee. Following the reference hearing which commenced on March 23, 1964, and was completed on April 1, 1964, the findings and report of the referee were filed with the California Supreme Court on May 21, 1964.

On October 2, 1964, Lessard filed objections to the report of the referee and a supplementary memo of points

and authorities which, in addition to the previous grounds urged, for the first time alleged a violation of his rights under Escobedo v. Illinois, 378 U.S. 478 (1964); and People v. Morse, 60 Cal.2d 631 (1964).

On February 18, 1965, the California Supreme Court granted the writ of habeas corpus with respect to the penalty phase of Lessard's trial, but in all other respects affirmed the judgment. Lessard petitioned for a rehearing on March 8, 1965, which petition was denied on March 17, 1965. The subsequent proceedings on the penalty phase resulted in the reduction of petitioner's sentence to life imprisonment.

On March 22, 1965, petitioner made a motion in the United States District Court for leave to reopen the habeas corpus matter and to file a supplemental brief therein. This motion was granted on April 8, 1965.

On September 27, 1966, the United States District Court denied Lessard's petition for a writ of habeas corpus. On October 7, 1966, he petitioned for rehearing, which petition was denied on October 12, 1966: however, the court certified that there was probable cause to appeal.

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ARGUMENT

I

PETITIONER'S CONTENTION THAT THE PROSECUTION INTRODUCED EVIDENCE OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE IS NOT PROPERLY BEFORE THIS COURT BECAUSE PETITIONER DELIBERATELY BY-PASSED AVAILABLE STATE REMEDIES.

It is petitioner's contention that the introduction into evidence of a shirt bearing the laundry mark "P-AL" and which was given to the police officers by petitioner's wife at her apartment, was improper because this evidence was secured by an illegal search and seizure in violation of the Fourth Amendment guarantees.

It appears plainly evident in the trial record that petitioner's counsel was fully aware that the evidence was obtained from petitioner's home on permission given by petitioner's wife. (See RT 528). Certainly these circumstances permitted an objection under People v. Cahan, 44 Cal. 2d 434 (1955), and Mapp v. Ohio, 367 U.S. 643 (1961), which latter case was decided five months prior to petitioner's November, 1961 trial.

However, at the trial not only did petitioner's counsel fail to object to the introduction of this evidence, but rather, after having gone so far as to apprise the trial court of his appreciation with respect to the importance of the circumstances under which the shirt was obtained, expressly stated that he had no objection to its receipt into evidence.

Moreover, the issue was not raised on petitioner's automatic appeal to the State Supreme Court, and therefore was not considered in their review of the trial court's judgment. See People v. Lessard, 58 Cal.2d 447 (1962).

This issue was raised for the first time by petitioner in his first petition to the California Supreme Court for a writ of habeas corpus. That court denied his petition without hearing (Crim. No. 7276, January 3, 1963). The issue was raised again in the petition filed in the United States District Court and which this Court ordered held in abeyance pending petitioner's resort to the State courts with respect to the other three new issues.

In the course of the subsequent State proceedings petitioner again raised the issue and it was finally resolved adversely to him by the California Supreme Court in In re Lessard, 62 Cal.2d 497 (1965). This issue was not resolved by an evidentiary hearing, but rather, the Supreme Court ruled that as a matter of law petitioner could not properly raise the point on habeas corpus because he not only failed to object to the evidence at the trial level but also expressly stated that there was no objection to it, and, in addition, did not raise the issue on appeal. In the alternative, the court went on to say that even if the issue were properly before it it was without merit.

Under State law, petitioner's failure to present the issue of illegal search and seizure at trial or on appeal precludes his later presentation of that issue in a state court by habeas corpus. In re Shipp, 62 Cal.2d 547 (1965); In re Dixon, 41 Cal.2d 756 (1953). In this respect, the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 659 fn. 9 (1961), said: "state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

Accordingly, in Nelson v. California, 346 F.2d 73 (9th Cir. 1965), this Court affirmed the District Court's denial of the petition for writ of habeas corpus without an evidentiary hearing where the defendant has deliberately bypassed the orderly procedure of the state courts and in so doing has thereby forfeited his state remedies. This Court held that a determination by trial counsel not to object to the introduction of evidence allegedly obtained as the result of an illegal search and seizure, precludes the defendant from later raising that same issue in a federal habeas corpus proceeding. See also Fay v. Noia, 372 U.S. 391, 438-440 (1963); Henry v. Mississippi, 379 U.S. 443 (1965); Choate v. Wilson, 363 F.2d 543, 544 (9th Cir. 1966); Herrera v. Wilson, 364 F.2d 798, 800 (9th Cir. 1966); Kuhl v. United States, 370 F.2d 20, 27, 29 (9th Cir. 1966); and Rhay v. Browder, 342 F.2d 345, 348 (9th Cir. 1965).

Because the record below clearly reflects that not only did petitioner fail to object at the trial to the introduction of the evidence, but rather shows that his counsel expressly stated that he had no objection to the evidence and further, did not raise the issue on appeal from that judgment, we respectfully submit that the only conclusion permissible from such a record is that petitioner has deliberately by-passed state procedure, thereby foreclosing any consideration by this Court with respect to the merits of that issue. We further submit that Nelson v. California, supra, is directly in point and controlling.

II

PETITIONER'S ALLEGATIONS THAT: (1) THE JURORS AT HIS TRIAL WERE GUILTY OF MIS-CONDUCT AND BIAS; (2) THAT HE WAS DEPRIVED OF HIS RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL; (3) THAT THE PROSECUTION KNOWINGLY SUPPRESSED MATERIAL EVIDENCE; (4) THAT THE PROSECUTION KNOWINGLY USED PERJURED TESTIMONY; ARE WITHOUT MERIT BECAUSE THESE ISSUES WERE RESOLVED ADVERSELY TO HIM AFTER FULL AND FAIR HEARINGS ON THEM BY THE STATE COURTS WHICH ACTED PURSUANT TO PROPER CONSTITUTIONAL STANDARDS

Petitioner's allegation that the jurors at his trial were guilty of misconduct and bias is based upon the averments in the affidavit of Bernice Mayerhofer, a juror whom the court discharged before the case was submitted to the jury. However, the trial court ruled against petitioner on this issue and rested its decision upon the affidavit of the jury's foreman, which affidavit directly contradicted

the allegations presented in the Mayerhofer affidavit. The California Supreme Court in People v. Lessard, supra, also carefully analyzed and adjudicated this issue. And, in In re Lessard, supra, the court again held the point to be without merit. Accordingly, we respectfully submit that the record reflects that issues of both law and fact were fully and fairly resolved by the state courts in accordance with the federal standards for due process of law. Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner's contentions that he was deprived of his right to be present at all stages of his trial and further prejudiced by perjured testimony and the suppression of material evidence, were ordered submitted to a referee for independent findings thereon. After conducting a thorough and exhaustive evidentiary hearing on these issues, the referee submitted his report to the California Supreme Court and therein found against petitioner on each of the questions presented. The California Supreme Court, relying primarily upon these findings of the referee, also ruled against petitioner on all three issues. Thus, here again the record below clearly demonstrates that these questions were fully and fairly resolved by the State Court in accordance with federal standards for due process of law. Townsend v. Sain, supra. We therefore respectfully submit that the United States District Court's decision below on these issues was correct and must be affirmed.

III

PETITIONER'S CONVICTION WAS NOT OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL

Petitioner contends that his right to counsel and right to remain silent as established in Escobedo v. Illinois, 378 U.S. 478 (1964), were abridged when the prosecution introduced into evidence a statement of petitioner taken at the time he was a prisoner in a federal penitentiary.

It is now clear that the rules laid down in Escobedo are not to be applied retroactively. Johnson v. New Jersey, 384 U.S. 719 (1966). Since petitioner's conviction became final in 1962, we submit that he may not now attack it on such grounds.

Although petitioner seeks to avoid the effect of Johnson v. New Jersey, supra, with the argument that "final judgment" (AOB 51) in his case did not occur until 1965 (because it was not until then that the penalty phase was resolved), such a contention is clearly devoid of merit. We submit that the definition of finality set forth in Linkletter v. Walker, 381 U.S. 618 (1965), is controlling: "By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" fn. 5, p. 622, Id. As Lessard did not petition for a writ of certiorari from the judgment of conviction, we submit that

the later proceedings with respect to the penalty phase of his trial had no effect on the finality of the guilt determination, and therefore, for Escobedo purposes, the decision became final in 1962. (See also In re Lessard, supra, 512, wherein the California Supreme Court ruled the decision final in 1962.)

We therefore respectfully submit that the lower court properly precluded petitioner from raising this issue.

CONCLUSION

For the reasons stated, the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: June 19, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General


DON JACOBSON

Deputy Attorney General

DJ:cmw
CR SF
63-196

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

June 19, 1967

A handwritten signature in dark ink, appearing to read "Don Jacobson". The signature is fluid and cursive, with the first name "Don" being more prominent than the last name "Jacobson".

DON JACOBSON

Deputy Attorney General
of the State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY WARREN GROSHART,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR. ,
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Attorneys for Appellee,
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FILED

MAY 19 1967

WM. B. LUCK, CLERK

MAY 20 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY WARREN GROSHART,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in three counts of a four-count indictment, at the conclusion of trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 545, and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code,

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. Co-defendant Jean Ellen Zeidler was charged in all four counts [C.T.2-5]. ^{1/}

Count One charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 65 pounds of marihuana into the United States from Mexico, and that defendant Zeidler knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].

Count Two charged that appellant and defendant Zeidler, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 65 pounds of marihuana, which marihuana, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].

Count Three charged that appellant and defendant Zeidler, with intent to defraud the United States, knowingly and wilfully smuggled, and clandestinely introduced into the United States from Mexico, approximately 1,000 amphetamine tablets and 1,030 Seconal capsules, which merchandise should have been invoiced, etc. [C.T.4].

Count Four charged defendant Zeidler with a false claim of American citizenship [C.T. 5].

^{1/} "C.T." refers to the Clerk's Transcript of Record.

Jury trial of both defendants commenced on August 23, 1966, before United States District Judge Fred Kunzel [C.T. 26]. The Court granted defendant Zeidler's motion for judgment of acquittal as to Counts One, Two, and Three. Appellant was found guilty as charged on August 24, 1966. Defendant Zeidler was found guilty as charged in Count Four upon the same date [C.T. 24, 29-30].

Thereafter, on September 23, 1966, appellant was sentenced to the custody of the Attorney General for five years upon each count, to run concurrently [C.T. 35]. He filed a timely notice of appeal [C.T. 32].

III

ERROR SPECIFIED

Appellant specifies only one alleged error upon appeal:

"The only error specified on this appeal is that a portion of defendant's custodial statement to the interrogating officers was admitted, although the inculpatory portion of the statement was considerably inadmissible as being secured in violation of the defendant's rights under the Fifth Amendment to the United States Constitution."

(Appellant's Brief, p. 4).

IV

STATEMENT OF THE FACTS

On April 10, 1966, appellant Groshart arrived at the San Ysidro Port of Entry in San Diego County. He was driving a 1950 Plymouth station wagon. Jean Zeidler was a passenger. The vehicle arrived at a point a few yards on

the American side of the international border with Mexico [R.T. 27-30, 33-34].^{2/}

Both occupants declared that they were American citizens. Miss Zeidler actually was not a citizen of the United States. They declared some merchandise to an Immigration officer but did not declare any marihuana, amphetamine, or Seconal [R.T. 27, 29-30, 163].

In a search of a portion of the vehicle, a number of packages were found in the tire well. The vehicle was taken from the primary inspection lane to the secondary area, where additional search resulted in the removal of 16 packages and two plastic jars from the tire well. Sixteen additional packages were found within side panels of the vehicle. These items were not visible without removing the top of the tire well or the side panels [R.T. 31, 46, 57-58, 63-64, 85].

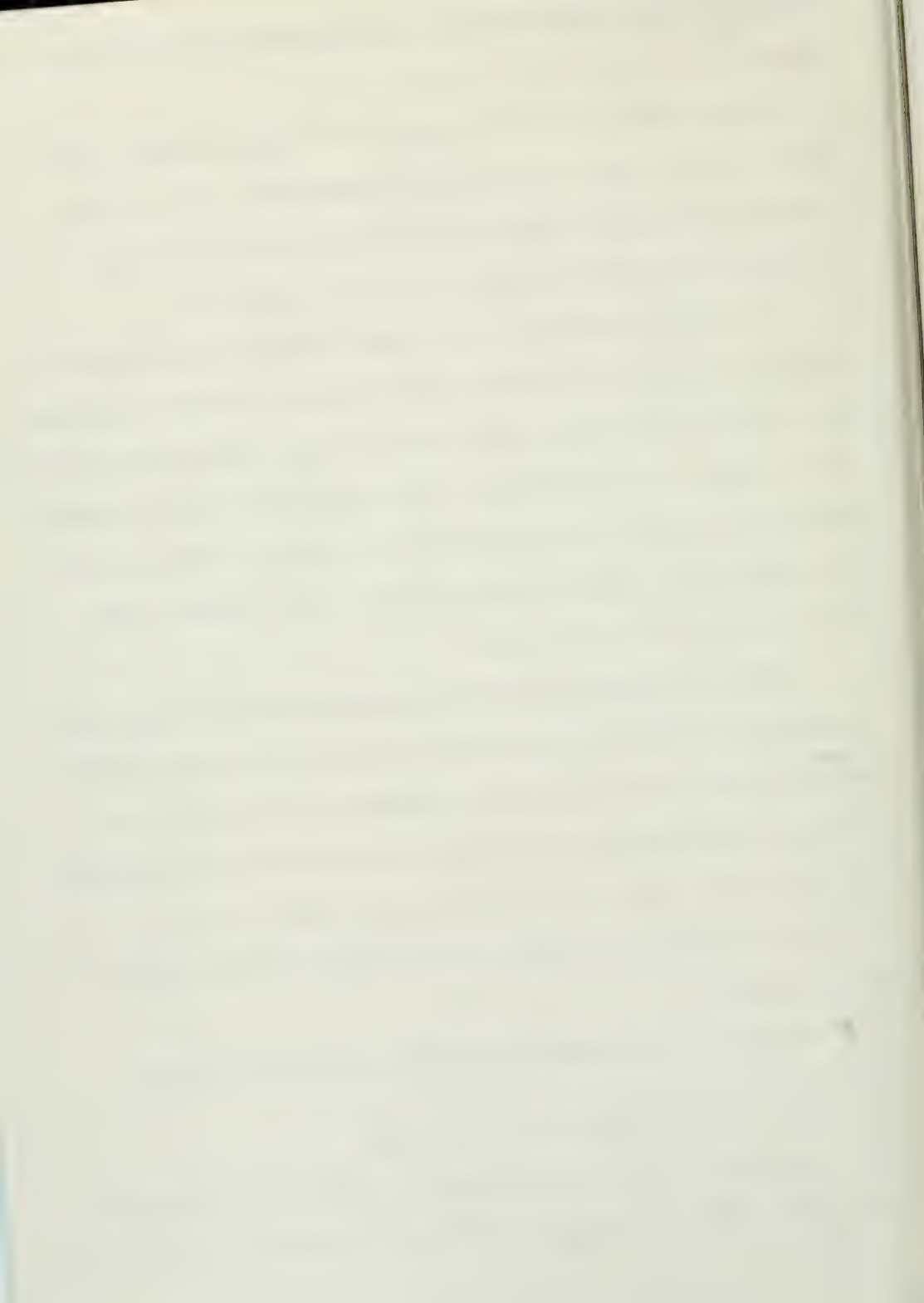
A chemist testified concerning his qualifications as an expert and testified that samples from the packages consisted of marihuana and that the other items included amphetamine and Seconal [R.T. 89-90, 93-97]. There was testimony relating to the chain of possession of the contraband [R.T. 33, 58-62, 64-65, 74-75, 77-79, 81-82, 88-92, 96, 103].

The marihuana had a selling price value of approximately \$1920 in Tijuana, Mexico.^{3/}

The vehicle was registered to Gary Peter Sutelu [R.T. 84-85].

^{2/}
"R.T." refers to the Reporter's Transcript.

^{3/}
This figure is based upon testimony to the effect that the price was about \$60 per kilo with each of the 32 "bricks" weighing one kilo [R.T. 68, 72, 81].



Appellant Groshart confessed, admitting that a man named "John" had asked him to drive the Plymouth station wagon to Mexico for the purpose of picking up a load of marihuana. The confession was not received in evidence although certain portions of it, which consisted of impeachment material, were heard by the jury [R.T. 132-33, 159-60, 167-68].

Appellant Groshart testified that he lived in the San Jose area at the time of the alleged offense; that he asked one "Dick Long" whether he could borrow "Long's" vehicle in order to take a trip to Tijuana; that "Long" agreed to this; that "Long" later changed his mind and refused to let appellant use the vehicle; and that "Long" said that he, "Long," could borrow a car from a friend in Santa Cruz "'on the pretense of going surfing or something.'" [R.T. 113, 116-18].

He also testified that the friend in Santa Cruz was Gary Sutelu; that the vehicle was borrowed from Sutelu; that he, appellant, has never seen Sutelu; that he drove to Tijuana with Jean; that they left the car in Tijuana; that they were away from the car for approximately ten hours (returning once to drop parcels off, and leaving again); that he believed that the car was not locked; and that he did not know that the contraband was in the vehicle [R.T. 118-21].

Evidence relating to statements made by appellant after his arrest was initially heard outside of the presence of the jury [R.T. 63, 135]. Customs Agent Thomas R. Donalson testified that he advised appellant that he did not have to make any statement and that any statement that he made could be used against him and that "he had a right to get an attorney any

time he wanted one." [R.T. 76-77, 137-38].

No threats or promises were made during the conversation. Appellant "very readily" provided the information to Agent Donalson [R.T. 142]. However, he stated that he did not wish to assist the Government in apprehending anyone else [R.T. 146].

Certain portions of appellant's statements were received in evidence in the jury trial itself. The jurors were instructed that the statements were admissible only upon the question of the credibility of the witness and not to establish the truth of the statements made [R.T. 159-60, 198]. Agent Donalson testified that appellant had stated that he had received the Plymouth station wagon from one "John" on April 9 and that he drove to Mexico with Miss Zeidler and parked the vehicle near a park in Tijuana, leaving it there for approximately four hours [R.T. 167-68].

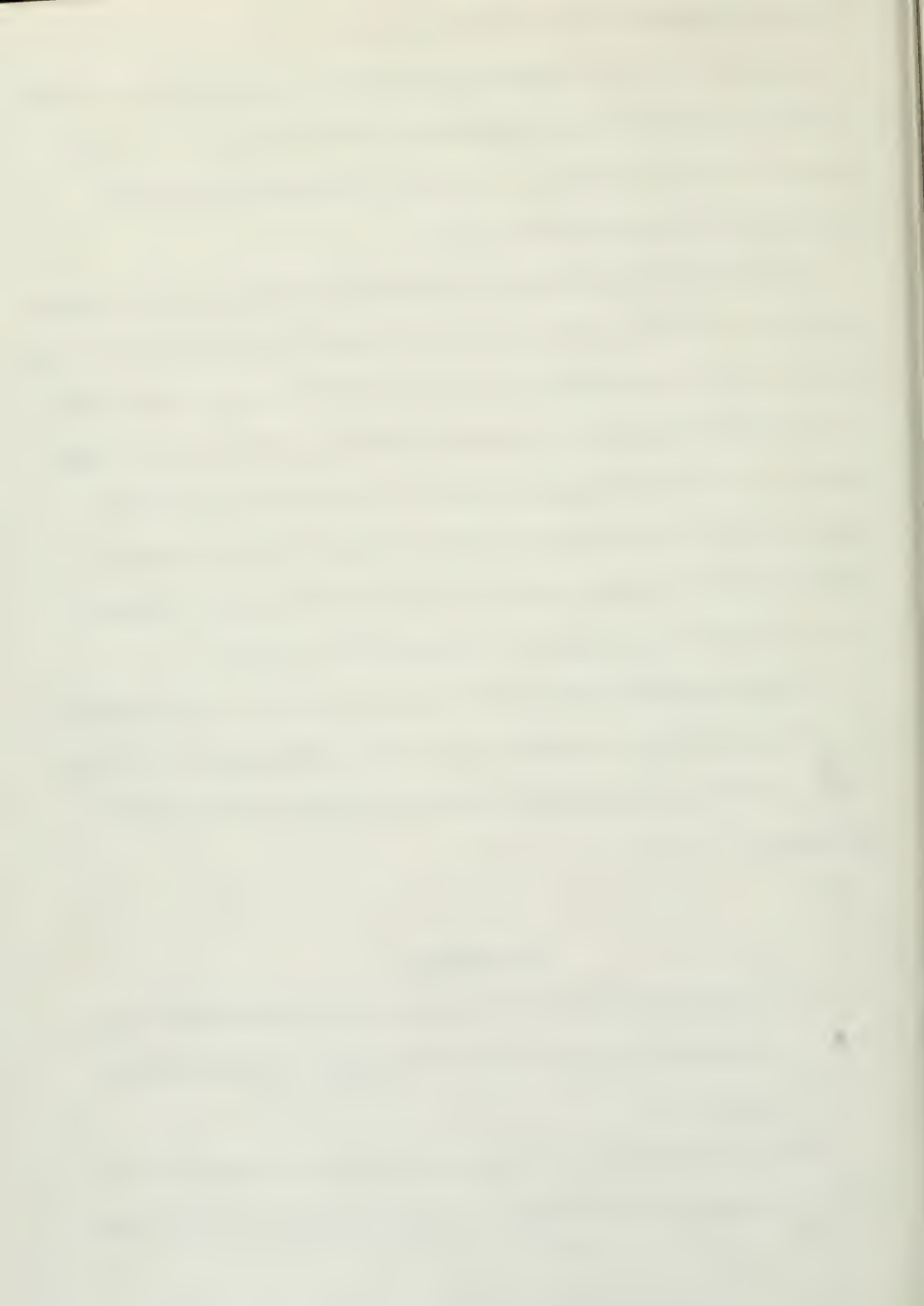
Appellant admitted that he had told the officers that he was contacted in San Jose, California, on April 8, by a person identified by him only as "John" and that "John" asked him to drive the Plymouth station wagon to Mexico [R.T. 159-60].

V

ARGUMENT

A. TESTIMONY CONCERNING APPELLANT'S STATEMENTS TO THE OFFICERS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant contends that testimony regarding his statement to the officers was erroneously received in evidence because the statement was



allegedly obtained in violation of the Fifth Amendment to the United States Constitution. Appellant bases his argument upon the rule announced in Miranda v. Arizona, 384 U. S. 436 (1966).

Appellant states that Agent Donalson did not sufficiently inform him of his Constitutional rights before questioning him. Agent Donalson advised appellant that he did not have to make any statement, that any statement that he made could be used against him, and that "he had a right to get an attorney any time he wanted one." [R.T. 137-38].

Not having had "fair notice"^{4/} of the unannounced formula later required by Miranda, a subsequent decision, Agent Donalson did not advise appellant that if he was indigent, an attorney would be appointed to represent him. (Since appellant had retained counsel in the San Diego trial [C.T. 31] he apparently was not indigent at that time).

Appellant's confession was not received in evidence. However, certain portions of the statement were received in evidence after appellant testified in contradiction to those portions.

In Walder v. United States, 347 U. S. 62 (1954), the United States Supreme Court ruled upon the question whether illegally-seized evidence could be properly received in evidence against a defendant who voluntarily presents perjurious testimony extending beyond a mere claim of innocence. The question was answered in the affirmative:

^{4/}

Johnson v. New Jersey, 384 U. S. 719, 732 (1966).

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment."

Walder, supra, at p. 65.

Upon direct examination, appellant not only claimed innocence but also embellished the story by providing an involved account of the means by which he obtained possession of the automobile involved in the case. He testified that the vehicle was obtained from Gary Sutelu by false pretenses because appellant wanted a vehicle for the purpose of making a trip to Tijuana. He indicated that "Dick Long" obtained the vehicle from Sutelu because "Long" had broken his promise to let appellant use "Long's" vehicle on the trip. He also testified that he was away from the vehicle for approximately ten hours in Tijuana, returning once during that period to drop parcels off and leaving again [R.T. 116-19, 121].

However, he had told Agent Donalson that he was contacted by one "John," who asked him to drive the vehicle to Mexico; that he received the vehicle from "John" on the following day; and that he left the vehicle in Mexico for approximately four hours [R.T. 159-60, 167-68]. The testimony concerning these statements (and a few other innocuous details) constitutes the evidence that is questioned by appellant in this appeal.



The jurors were instructed that the statements were admissible only upon the question of the credibility of appellant and not to establish the truth of the statements made [R.T. 198].

It is respectfully submitted that the statements were properly received in evidence under the Walder doctrine. However, appellant seeks to distinguish Walder upon the ground that Walder involves Fourth Amendment rights, while Miranda is concerned with Fifth Amendment rights.

(Appellant's Brief, p. 12).

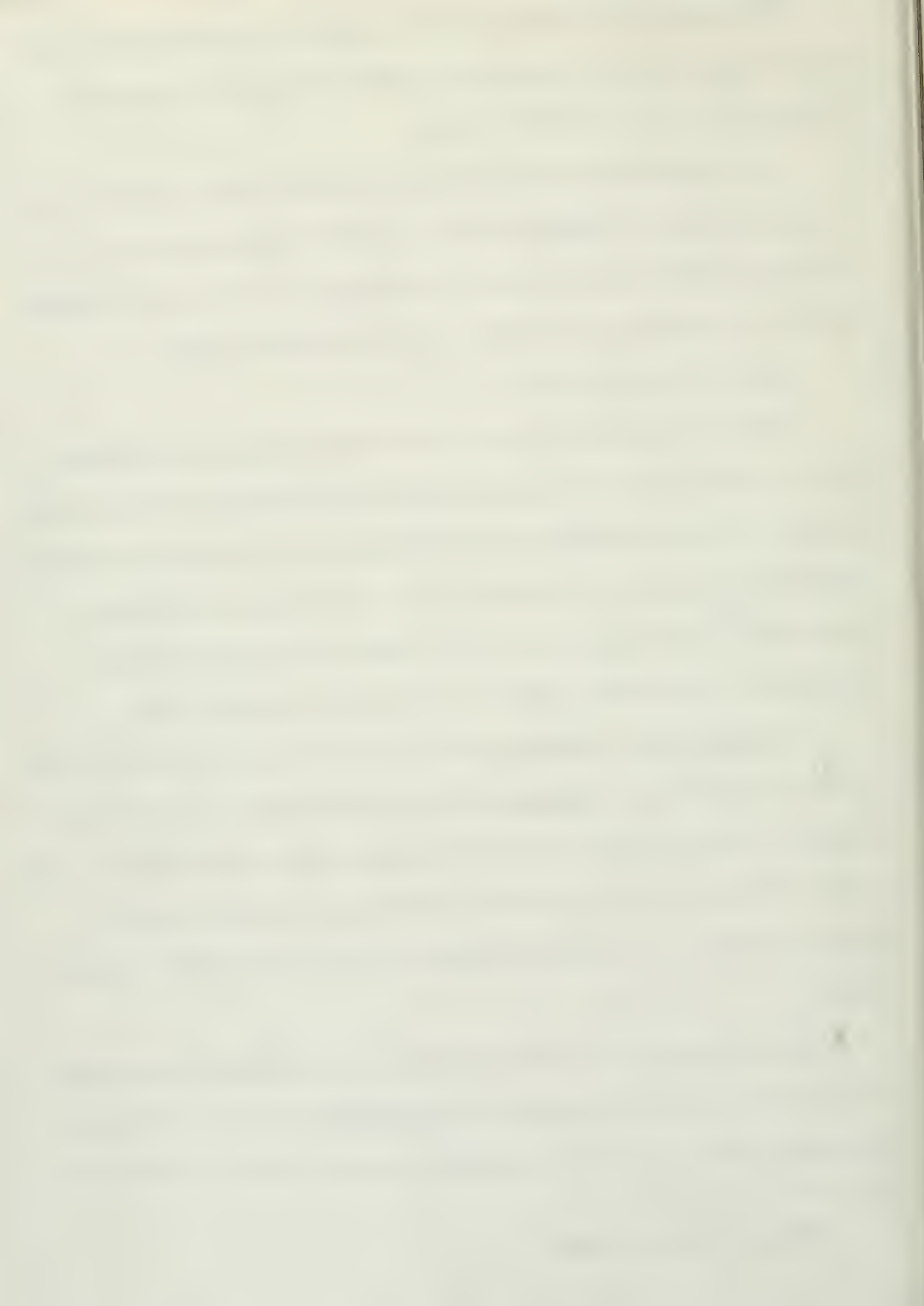
There does not appear to be any reason for allowing defendants freer reign to commit perjury in cases involving Fourth Amendment violations than in cases involving unintentional Fifth Amendment self-incrimination violations. A Walder doctrine which blocks the road to "a perversion of the Fourth Amendment"^{5/} would also have a value in other cases involving other Amendments. This view is supported by precedent as well as logic.

In United States v. Mullings, 364 F. 2d 173 (2nd Cir. 1966), the Court of Appeals considered the Miranda rule in connection with a claim that the defendant was not correctly informed of his legal rights and added (at p. 176, n. 3) that the defendant's statement could have been received under the Walder doctrine if the defendant had taken the stand and testified in contradiction.

Other decisions have strongly implied that the Walder doctrine applies to statements obtained in violation of the Miranda formula or an analogous violation of the rule set forth in Escobedo v. Illinois, 378 U. S. 478 (1964).

^{5/}

Walder, supra, at p. 65.



United States v. Accardi, 342 F. 2d 697, 701 (2nd Cir. 1965), cert. denied, 382 U. S. 954 (1965) (alternative argument involving Escobedo question);

Fernandez v. Delgado, 257 Fed. Supp. 673 (D. C. Puerto Rico 1966) (alternative holding).

In United States v. Curry, 358 F. 2d 904 (2nd Cir. 1965), cert. denied, 385 U. S. 873 (1966), appellant Curry contended that his statements were obtained in violation of his Sixth Amendment right to counsel (apparently because he was not provided with counsel when the request was made, in violation of the Escobedo doctrine). He contended that the Walder rule does not apply when evidence is excluded because unconstitutionally obtained. The Second Circuit rejected this contention, noting that exclusion of the impeaching testimony upon rebuttal "would be an unnecessary impediment to the search for truth." (at p. 911).

In view of the fact that the Walder doctrine applies to the Fourth Amendment, applies to the Sixth Amendment (Curry, supra), and applies to the McNabb-Mallory doctrine, ^{6/} there is no reason to conclude that it does not apply to a Fifth Amendment situation which is closely related to the Sixth Amendment question decided in Curry, supra.

Appellant quotes language in Miranda to the effect that unless the suspect is informed of his rights, "no evidence obtained as a result of interrogation can be used against him."

Miranda, supra, at p. 479.

^{6/}
Tate v. United States, 283 F.2d 377, 380-81 (C.A.D.C.1960).

However, it is respectfully submitted that the quoted language does not bar an exception to the Miranda rule any more than the following general language prevented the Walder exception to the general rule:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920)

This broad language did not prevent the birth of the Walder doctrine.

Appellant suggests that the trial Court admitted the statements under the erroneous assumption that they were merely exculpatory rather than inculpatory. Appellee agrees that the same rule applies, regardless of whether the statements are exculpatory or inculpatory. The issue is not whether they were inculpatory, but whether they fall within the scope of the Walder doctrine. This doctrine includes damaging admissions:

"But the Supreme Court in Walder did not suggest that impeaching evidence is to be excluded because it is damaging; there is little point for prosecutors to offer, or courts to allow, impeaching evidence unless it has some relevance to credibility."

Tate v. United States, *supra*, 283 F. 2d 377, 380.

Appellant also suggests that he was not properly impeached in regard to statements that he allegedly did not recall making. This argument is apparently based upon the theory that a party may destroy an opposing party's impeachment evidence by merely claiming a lapse of memory. The law does not support such an unjust and unreasonable proposition.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

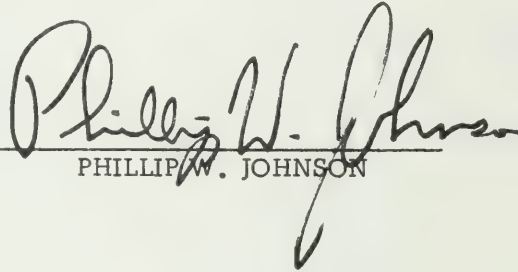
EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, reading "Phillip W. Johnson", is written over a horizontal line. The signature is fluid and cursive, with the first name "Phillip" being the most prominent. The last name "Johnson" is also clearly legible. The line underneath the signature is a simple horizontal stroke.

PHILLIP W. JOHNSON

NO. 21518 ✓

IN THE UNITED STATES COURT OF APPEALS
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OSCAR JOHN HUGUEZ,

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FILED

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NO. 21518

IN THE UNITED STATES COURT OF APPEALS

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a four-count indictment, following a non-jury trial [C.T. 2-5, 28].¹

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 1407, and 3231, and Title 21, United

¹

"C.T." refers to the Clerk's Transcript.

States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant knowingly imported and brought approximately four ounces of heroin, a narcotic drug, into the United States from Mexico, and that Richard Paul Baros knowingly aided, abetted, counseled, induced, and procured the commission of that offense |C.T. 2|.

The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately four ounces of heroin, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Richard Paul Baros knowingly aided, abetted, counseled, induced, and procured the commission of that offense |C.T. 3|.

The third count charged Baros with failure to register under 18 U.S.C.A. 1407. The fourth count alleged that appellant entered, and attempted to enter, the United States without registering under 18 U.S.C.A. 1407, being a citizen of the United States who had a prior narcotics conviction and was a narcotics addict and

Court trial of appellant commenced on May 26, 1966, before United States District Judge Fred Kunzel [R.T. 25-27]². Appellant's Motion to Suppress Evidence was heard and denied during the trial. Appellant was found guilty as charged in the first two counts on May 26, 1966 [R.T. 134]. The fourth count was dismissed [C.T. 28].

On July 25, 1966, appellant was sentenced to the custody of the Attorney General for seven years upon each of the first two counts, to run concurrently, with a recommendation that the Attorney General designate a state institution as the place of confinement [C.T. 28].

Thereafter, appellant filed a timely notice of appeal [C.T. 29].

III

ERROR SPECIFIED

The only error specified on appeal is the denial of the motion to suppress evidence which allegedly was unlawfully seized.

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico with one companion on March 13, 1966. The entry was made in San Diego County, California [R.T. 75-76]. The two men declared no narcotics to the United States Customs inspector, Thomas N. Teela,

²

"R.T." refers to the Reporter's Transcript on Appeal.

who met them at the primary inspection point [R.T. 75.77].

Inspector Teela, who had been a Customs inspector at San Ysidro for eight years and had had experience in observing narcotics suspects during that period, observed that appellant's eyes, and those of his companion, appeared to be pinpointed and glassy. Appellant "appeared to be under the influence of narcotics." [R.T. 77-78, 81].

Appellant was searched in a secondary area search room. His rectal area appeared to contain a greasy substance [R.T. 78-79]. Appellant was taken across the street to the doctor's office, which was at the port of entry at San Ysidro, California. Dr. Paul R. Salerno examined appellant [R.T. 28, 31, 89].

Dr. Salerno, who was licensed to practice medicine in the state of California, testified concerning his academic training and subsequent experience in the examination of suspected narcotics users [R.T. 28-30]. He reached the opinion that appellant was a user of narcotics who was then under the influence of a narcotic drug [R.T. 31-32].

After this opinion was reached, Dr. Salerno was requested to conduct a rectal examination to determine whether concealed material was in the rectal cavity. Dr. Salerno employed a lubricated gloved finger and located four large packets in the rectal cavity. This examination was similar to the rectal examination

that is part of any complete physical examination for an adult male. These packets were gently extricated. It was stipulated that the packets contained approximately four ounces of heroin [R.T. 33-37].

The examination and the removal of the packets were accomplished in a medically-approved manner. Appellant began to resist as soon as the material was palpated, and it was necessary for agents to forcibly restrain him while the packets were removed. No blows were struck, and there was no bleeding [R.T. 34, 46, 61, 74, 93].

Dr. Salerno testified that in the absence of voluntary resistance by contraction of the external sphincter of the anus, the removal of the packets "would not be expected to be any more uncomfortable than that experienced with a constipated or hard bowel movement." He also testified that the introduction of such packets into the rectal cavity would be expected to involve greater discomfort than their removal, provided that resistance was not offered in either case [R.T. 39-41].

He also testified that there would be a mechanical and chemical attack upon the rubber containers in the rectum over a period of time; that the release of the heroin into the rectum could result in death; and that leaving the packets in the rectum for more than six to eight hours "would certainly be hazardous." [R.T. 42-43]. He testified that a man in a prison cell might possibly hold the object

in his rectum for several days; that it would take approximately eight to ten hours for an oral laxative to achieve effective results; that there is a health hazard involved in taking laxatives; that an X-ray machine or a fluroscope would not permit differentiation between the package materials and normal fecal contents; that X-ray machines and fluoroscopes should be operated only by radiologists; that no radiologist was available. [R.T. 44-46].

After the packets were removed, appellant admitted that he had been sent from Los Angeles to pick up the heroin and that he had secreted it in his rectum. He did not complain of any injuries [R.T. 97-98, 106].

Appellant testified that he resisted the search; that he had a slight cut on his wrists from handcuffs employed during the search; and that he had inserted the objects into his rectum with soap and water, not grease [R.T. 113-116].

Between July 1, 1965 and May 26, 1966, there were 20 seizures of narcotics from body cavities [R.T. 122].

The motion to suppress evidence was denied. The Court stated that where there is a well-founded suspicion that a person crossing the border is using narcotics, "it follows almost as night follows day that he is carrying narcotics somewhere, because the supply is easy to get in Tijuana, it is cheap, and they are going to bring it across." [R.T. 132-34].

Since appellant's affidavit in support of the motion to suppress evidence was not received in evidence upon the hearing of the motion, no attempt has been made here to emphasize the discrepancies between the affidavit C.T. 18-20' and the testimony of eyewitnesses.

V

ARGUMENT

A. The Evidence Was Obtained In A Reasonable Manner.

Appellant maintains that the officers should have obtained a search warrant before asking a physician to examine appellant's rectum. However, he also claims that there was insufficient probable cause to obtain a search warrant (Appellant's Brief, pp. 12-14, 26).

Since probable cause to believe that a person is smuggling narcotics in a body cavity will rarely if ever, be obtained in the absence of a confession by the smuggler or a conspirator, appellant is suggesting that the Constitution of the United States requires that the barriers to unrestricted importation of narcotic poisons, small espionage materials, and other small items be swept away. Perhaps the United States would then become the first great nation in history to provide a free license to smugglers who use the body cavities.

To borrow the language of Judge Barnes in Rivas, supra, "We again are faced with the practical problem: must the people of the

United States permit the wholesale introduction of narcotic drugs into the United States?"

Fortunately, probable cause has never been required for a border search. It also is not required for rectal border searches.

Rivas v. United States, 368 F. 2d 703, 709 (9th Cir. 1966;

Murgia v. United States, 285 F. 2d 14, 17 (9th Cir. 1960).

Rectal searches similar to the one performed in the instant case have been repeatedly upheld by this Court.

Blackford v. United States, 247 F. 2d 745 (9th Cir. 1957);

Murgia v. United States, supra;

Denton v. United States, 310 F. 2d 129 (9th Cir. 1962);

Morgan v. United States, 340 F. 2d 125 (9th Cir. 1965);

Rivas v. United States, 368 F. 2d 703 (9th Cir. 1966);

Spears v. United States, 370 F. 2d 335 (9th Cir. 1967);

There is a remarkable similarity between the facts of the instant case and the factual situation in Rivas, supra. However, appellant attempts to distinguish Rivas upon each of the following grounds:

(1) Rivas registered under 18 U.S.C.A. 1407, while appellant did not.

(2) Rivas was nervous.

(3) Rivas refused to cooperate during the "strip search."

The fact that appellant failed to register, although he was a

user of narcotics , was a highly-suspicious circumstance that added to the weight of the officers' belief that a rectal search was necessary. The most likely motive for failing to register and thereby risking a felony arrest would be the desire by the offender to avoid attention by not registering, because special attention might lead to discovery of smuggled narcotics , as it did in Rivas.

The fact that Rivas was nervous was a small matter in comparison with the highly-significant fact that appellant Huguez's rectal area appeared to contain a greasy substance [R.T. 78-79]. Appellant minimizes this factor upon the assumption (not clear from the record) that none of the inspectors informed Agent Gates that the greasy substance was observed. However, it is highly probable that the greasy appearance of the rectal area played a role in the decision to have appellant examined by a physician. Appellant states that in Blackford, supra, Blackford's admission and the grease upon his buttocks provided "two very good reasons for concluding that there was heroin in his rectum." (Appellant's Brief, p.28).

While appellant emphasizes the fact that Rivas refused to cooperate during the "strip search", giving rise to the inference that there was something there that he did not want the agents to see, "which gave rise to the further inference that he was carrying contraband in his rectum", the facts herein would lead to a

similar inference, for appellant testified that he objected to the removal of his clothes at the time of the first search and then objected to the request that he bend down [R.T.111].

To summarize, there is a close similarity between the facts of Rivas and the facts of the instant appeal. In each case, the suspect was under the influence of narcotics. In each case, the suspect objected to the original searchroom procedure.

Appellant contends that while urgent action was necessary in Rivas, immediate search of appellant was not necessary because he was subject to arrest under 18 U.S.C.A. 1407 (for failure to register) and could have been held until a search warrant was obtained. (Rivas actually was arrested under 18 U.S.C.A. 111 before the rectal examination was made). Appellant's argument is inconsistent with his assumption that the total information received by Agent Gates from the inspectors consisted of the statement that "both men had needle marks on their arms." (Appellant's Brief, pp. 25-26, footnote 18). If Agent Gates was told no more, how did he know that appellant failed to register or that he was a citizen of the United States?

More importantly, appellant's argument again assumes that a search warrant is required, adding a probable cause requirement that is utterly at variance with existing law relating to border searches.

Had appellant been arrested, he would have had the right to

post bail immediately.

Appellant cites Blefare, v. United States, 362, F. 2d 870 (9th Cir. 1966) , to support the proposition that "Some knowledge of the presence of narcotics" is necessary (Appellant's Brief, p. 27) . However , Blefare involved a stomach search. Blefare, like Schmerber v. United States, 384 U.S. 757 (1966) (forcible extraction of blood) , also cited by appellant, involved conduct far more serious than the mere rectal probe involved in this case.

Appellant also cites Cervantes v. United States, 263 F. 2d 800 (9th Cir. 1959). However , Cervantes did not involve a border search, so the decision was based upon a probable cause requirement not present in border searches.

VI

CONCLUSION

For the foregoing reasons , it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted ,

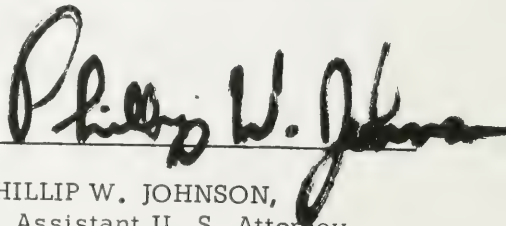
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON,
Assistant U. S. Attorney

NOV 12 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSCAR JOHN HUGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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NO. 21518

PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant,)	
)	
vs.)	NO. 21518
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
_____)	

PETITION FOR REHEARING

TO: THE UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT AND THE HONORABLE CIRCUIT JUDGES BARNES
AND ELY AND UNITED STATES DISTRICT JUDGE ANDREW
HAUK:

Comes now the UNITED STATES OF AMERICA, appellee in the
above-entitled cause, and, pursuant to the provisions of
Rule 40 of the Federal Rules of Appellate Procedure, peti-
tions the panel which rendered the decision in the above-
entitled cause, which said opinion was filed September 30,
1968, for a rehearing on the following grounds:

1. The decision should specity whether a new trial
be ordered by the trial Court. The opinion herein emphasizes
a lack of evidence concerning the knowledge possessed by Dr.
Salerno and the officers in regard to the suspect. Such
evidence was not produced because it was not considered to be

essential under the legal standards then in effect. As the opinion of Judge Hauk notes, the test for body cavity border searches changed between the time of trial and the date of the Huguez opinion herein. It was assumed at the time of trial that "mere suspicion" was the test. The trial Judge applied a test of "some suspicion." [R.T. 129-130]¹ The Government produced more than the required evidence to satisfy this "suspicion" standard. However, the standard changed to "plain suggestion," a stricter standard, after the trial herein.

Rivas v. United States, 368 F.2d 703, 710
(9th Cir. 1966)

In view of the huge quantity of narcotics involved herein, it is respectfully suggested that a change in legal standards should not prevent a retrial where the evidence may show that the stricter standard was satisfied. A similar procedure was followed in Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960), in which case there was a second hearing upon the Fourth Amendment question after reversal upon appeal in Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959).

In Polk v. United States, 291 F.2d 230, 232 (9th Cir. 1961), this Court found a "paucity" in the record

¹ "R.T." refers to Reporter's Transcript of Proceedings.

regarding a Fourth Amendment question and remanded the case for further proceedings, resulting in the affirmance of the judgment of conviction, Polk v. United States, 314 F.2d 837 (9th Cir. 1963). It would appear that this procedure is preferable to taking the assumption that the record is unfavorable to the prevailing party merely because it is silent, where the silence upon the matter may be attributed to conclusions drawn from a legal analysis of the case law then in existence.

2. It is respectfully submitted that the decision herein is inconsistent with the decision of this Court in Rivas, supra, which provides the clearest previous Ninth Circuit analysis of the term, "plain suggestion." The opinions herein tend to cause confusion and uncertainty in the law.

It also is respectfully suggested that portions of the opinions herein are unduly critical of Dr. Salerno and the Customs officers. It is reasonable to assume that Dr. Salerno would be required to follow any orders of the Customs agents, assuming that they are lawful (an involved legal question at the time), as any person within three miles may be required to assist an authorized Customs agent in a search or seizure and is guilty of a criminal offense if he refuses to do so. 19 U.S.C.A. 507.

In view of the fact that the entire procedure was carried out "in a medically-approved manner" [R.T. 34]; that

the rectal examination which located the contraband narcotics was not painful [R.T. 38]; that the removal of the contraband would not have been more uncomfortable than a hard bowel movement, in absence of resistance [R.T. 39]; that if the officers believed that the search was lawful, they would naturally follow the principle that necessary force may be employed to overcome resistance to a lawful search; and the fact that there is little reason to believe that the removal was more violent than the forcible removal of narcotics from rectums in Blackford v. United States, 247 F.2d 745, 747 (9th Cir. 1957), and Denton v. United States, 310 F.2d 129, 131 (9th Cir. 1962), it is suggested that it is questionable whether it is completely fair to Dr. Salerno and the agents to describe the procedure as brutal and frightening and to suggest that the medical surroundings were indecent. In Denton, supra, a needle injection was forcibly given to the suspect as he physically resisted, "suddenly throwing up his hands" (at p. 131). (Appellee recognizes that the language of the opinions herein is not ground for rehearing).

For the two reasons previously stated, appellee respectfully submits that a rehearing of this cause should be ordered.

Respectfully submitted,

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United States Attorney

PHILLIP W. JOHNSON
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---oOo---

FRANK E. EALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21520

APPELLANT'S OPENING BRIEF

This is an Appeal from the Judgment and Conviction
of the United States District Court for the
Western District of Washington
Northern Division

The Honorable William T. Beeks
Judge Presiding

FILED

MAY 8 1967

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MAY 8 1967

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---oOo---

FRANK E. EALEY,)	
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Appellant,)	
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vs.)	No. 21520
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UNITED STATES OF AMERICA,)	
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Appellee.)	
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APPELLANT'S OPENING BRIEF

This is an Appeal from the Judgment and Conviction
of the United States District Court for the
Western District of Washington
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The Honorable William T. Beeks
Judge Presiding

STATEMENT OF THE CASE

Defendant was charged in a six count indictment, two counts each of violation of 21 U.S.C. 174, 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a), on or about July 27, 1966; was duly arraigned on or about August 17, 1966 and entered pleas of not guilty to each count. Trial by jury was set for September 6, 1966 and commenced on that date. A verdict of guilty was returned by the jury on each count of the indictment on September 6, 1966, and on October 28, 1966, judgment and sentence was pronounced and imposed on Counts I, II, V and VI. The Court set aside the verdicts of guilty on Counts III and IV of the indictment and dismissed said counts pursuant to defense counsel's motion made at the close of the Government's case (R. T. pp. 104-8) and on which ruling had been reserved. Defendant appealed from the judgment and sentence rendered.

STATEMENT OF FACTS

In a six count indictment defendant was charged as follows:

(1) Two counts of violation of 21 U.S.C. 174, Count I charging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully concealed and sold a quantity of narcotic drugs, heroin hydrochloride, knowing the same to have been imported into the United States contrary to law. An identical charge to Count I is made in Count II except that the alleged offense occurred on or about January 13, 1966. (2) Two counts of violation of 26 U.S.C. 4704(a), Count III charging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold, dispensed and distributed, a quantity of heroin hydrochloride, a narcotic drug not in or from the original stamped package. An identical charge is made in Count IV except that the alleged offense occurred on or about January 13, 1966. (3) Two counts of violation of 26 U.S.C. 4705(a) Count V alleging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold a quantity of heroin hydrochloride, a narcotic drug, not in pursuance to a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegatee. Count VI charges an identical offense except that it allegedly occurred on or about January 13, 1966.

At the trial the Government called one Joseph Vincent Ferro, a narcotic agent, who testified that his office investigated defendant in October, 1965, on the basis of information received

from the Bureau's Los Angeles office. R. T. 7. Joseph Gordon, a deputy sheriff, was engaged and used as an undercover agent to investigate defendant and on December 16, 1965, Gordon was given \$500 of official advance funds (money used to purchase narcotics) R. T. 8, and told to go to the residence of an informant, Harvey Edwards, for the purpose of purchasing narcotics from defendant. The residence in question was placed under surveillance by Ferro and others assisting him. Defendant was later observed leaving the residence in question with Deputy Gordon and the latter had a container, containing a white substance later admitted into evidence as People's Exhibit 1. R. T. 13.

On January 13, 1966, Ferro testified that he gave Gordon \$1,100 to purchase narcotics from defendant. R. T. 21. The narcotics allegedly purchased were admitted into evidence as People's Exhibit 2.

Ferro did not personally know defendant before the above mentioned incidents.

Agent Ferro testified, over objection, that the narcotics allegedly purchased on December 16, 1965 did not bear a tax stamp. R. T. 14. He further testified that he does not issue order blanks of the Secretary of Treasury for purchase of narcotics; he is not assigned to that department nor is it one of his duties. R. T. 18-20. He also testified that the container wherein the narcotics allegedly purchased on January 13, 1966 had no tax paid stamp affixed to it. R. T. 25. He is not familiar with the type of stamp placed on "these packages." R. T. 27. The jury was then admonished to disregard all of the testimony that no tax stamp appeared on the Government's

Exhibits 1 and 2.

Joseph Gordon, deputy sheriff, King County, was loaned to Federal Bureau of Narcotics, testified that he first met defendant at 3646 Courtland Place South where a person by the name of "Harv" resided. He was not in uniform nor did he reveal who he was to defendant at this meeting or any other. R. T. 31-32. On December 16, 1965, he purchased narcotics from defendant.

Gordon testified that on January 6, 1966, he placed a person to person call to defendant in Sacramento, California. R. T. 42, with Ferro and Agents McClain and Abbey listening on extension phones. He did not, however, recognize defendant's voice. After a voice came on the phone, Gordon stated "Hello Frank" and after conversation by the party on the other end, he stated "I need three and at least two." Use of such jargon means ounces of heroin. R. T. 45. No other testimony was given regarding this telephone conversation.

On January 13, 1966, the Bureau gave Gordon \$1,100 of advance government funds with which to purchase narcotics. Gordon is not registered with anyone to purchase narcotics except in his official position. Nor did he have any authority from Secretary of the Treasury either time the alleged purchases took place. R. T. 57. On this particular day a sale of heroin was consummated with defendant by Gordon.

Aubrey Abbey, Agent Federal Bureau of Investigation, corroborated the testimony of Ferro and Gordon. R. T. 74-93. William J. Gowans, chemist employed by the United States Treasury Department testified that the powdered substance in Exhibits 1 and 2, in his opinion

after conducting certain tests, was that the substance was heroin hydrochloride.

After the Government rested defendant moved the Court out of the presence of the jury for a directed verdict of acquittal. R. T. 104. The Court denied all motions for mistrial and denied the motion for judgment of acquittal on Counts I, II, V and VI of the indictment. The Court reserved ruling on Counts III and IV until after the jury's verdict was returned finding defendant guilty on each count as charged.

ARGUMENT

I. WHETHER THE COURT COMMITTED PREJUDICIAL ERROR BY RESERVING ITS RULING ON COUNTS III AND IV OF THE INDICTMENT, SUBMITTING THE SAME TO THE JURY ALONG WITH OTHER COUNTS IN THE INDICTMENT.

It should be made clear at the outset that no challenge here is intimated or remotely suggested or intended regarding the court's setting aside the guilty verdicts of Counts III and IV of the indictment and acquitting defendant on these counts. What is challenged here is the procedure the trial court followed in doing so. It is defendant's contention, then, that it was prejudicial error for the court to first submit the two counts to the jury after a motion was timely and duly made to direct acquittal or dismiss and rule on the motion after verdicts of guilty had been reached.

Following such a course in the factual circumstances of this case, we believe, manifestly resulted in reversible error. It should be kept in mind that all six alleged offenses occurred on two different dates. In fact the two quantities of alleged contraband drug were the basis for the three different charges on the two different occasions. Hence, in the minds of a lay jury a finding of one violation would automatically require a finding of guilt on all charges based on the same alleged incidents. Much like the situation in Chichos vs. Divideria, 87 S. Ct. 271 (1966) by parading six counts

of alleged illegal conduct before the jury, such a procedure "gave the prosecution an advantage of offering the jury a choice -- a situation apt to induce a doubtful jury to find the defendant guilty xxx." U. S. ex rel Hetenyi vs. Wilkens, 384 F. 2d 844, C.A. 2d (1965), cert den. Mancusi vs. Hetenyi, 383 U.S. 913.

Rule 29, FRCP, provides:

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the Court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the Court may order a new trial or enter judgment of acquittal.

Rule 29 is worded in the context of a motion of acquittal being made to the entire charge or indictment. It is not framed in such a way as to challenge, in part, selected counts. Hence, in such cases, by lumping those charges upon which evidence has been admitted but which as a matter of law is not sufficient to sustain conviction, a defendant is placed in the unwary predicament of having

a doubtful jury convict him on a wholesale basis of all of the charges submitted to it. And that is exactly what occurred here. See Federal Practice and Procedure, Sections 2221-2225.

To be sure there was not one single scintilla of evidence presented that defendant knowingly sold or dispersed a quantity of narcotics "not in or from the original package." The corpus delecti of the offenses charged in Counts III and IV was not established and as a matter of law and no offenses shown. See Epstein vs. U. S. 174 F. 2d 754, 6th Cir. (1949). Defendant, being his only witness, denied all allegations of all counts. He had no burden to meet as to any issue or element of the offenses charged in Counts III and IV. Thus, the record remained as it was at the close of the Government's case regarding these charges. It, therefore, was incumbent upon the trial judge to grant the motion before submitting the case to the jury. Having failed to do so and in the circumstances of each of the four remaining charges on which convictions were rendered, after the close of the case and discharge of the jury, defendant should have been granted a new trial in order to avoid the prejudicial effect of having two charges legally deficient considered along with other charges.

II. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUBMIT COUNTS V AND VI TO THE JURY AND A MOTION OF ACQUITTAL ON THESE COUNTS SHOULD HAVE BEEN GRANTED.

One reading the indictment in this case must conclude

that the Government either over zealously fractionalized its case into legally defective counts in order to achieve a desired result or over estimated the evidence it had to establish a case. The record is devoid of any evidence tending to establish directly, circumstantially or by inference that on either December 16, 1965 or January 13, 1966, defendant knowingly or unlawfully sold a quantity of heroin hydrochloride "not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate."

Agent Ferro and Deputy Gordon testified at length regarding the use of advance funds with which to purchase evidence but such testimony, it is submitted, does not raise the inference that the requisite form was not obtained also or represented to defendant to have been obtained. Source of the funds used to purchase contraband is no element of the offense but the absence or presence of the requisite form is indeed. While it is true on Deputy Gordon testified, in the context of the question raised that he did not "have any sort of written form from the Secretary of the Treasury, the type of form which authorizes the purchase of narcotics xxx" at the time of an alleged purchase (R. T. pp. 56-58) such questions and answers do not settle the matter because the statute specifically provides that a delegate of the secretary may issue the requisite form. In addition, from the Government's entire case, we had at least three other persons assisting in the events: Ferro, Abbey and McClain. There is no testimony that neither of those persons had no form or that Gordon was not acting, at the time of the alleged purchases, for each or any of them.

In addition, as the record shows, Ferro was unfamiliar with the forms required and there was no showing that Gordon knew any more about what was required or had in fact been obtained. In the circumstances, it is submitted these counts should not have been submitted to the jury on such shallow evidence and absence of proof of an element of the charged offenses.

This factor together with the court's submission of Counts III and IV to the jury resulted in a prejudicial error to defendant.

III. DEFENDANT'S ACQUITTAL OF COUNTS III AND IV
FORECLOSED CONVICTION ON COUNTS I AND II UNDER
THE FACTS OF THIS CASE.

21 U.S.C. Section 174 and 26 U.S.C. 4704(a) contain what Chief Judge Bazelon has termed "statutory overlap." See concurring opinion, Hutcherson vs. U.S., 345 F. 2d 964, D. C. Cir. (1965). A reading of both sections indicate that 26 U.S.C. 4704(a) is more specific in its reach than 21 U.S.C. 174. Thus where a defendant is acquitted of charges of knowingly selling contraband not from its original package or without the appropriate stamps affixed, a Section 174 charge under Title 21, based on the same conduct must necessarily fall. This is so because narcotics possessed in the original package properly stamped would raise no presumption of illegal entry or importation into the United States and would not place upon a defendant any necessity to explain his possession. Thus, where a prosecutor has elected as he might to charge a defendant with counts of violation of both 21 U.S.C. 174 and 26 U.S.C. 4704(a) based on

the same conduct acquittal on the latter charge necessarily compels acquittal on the former.

We raise no questions here that the United States Attorney could not bring the charges as he did. What is contended here is that, having elected to prosecute in this way, he is bound by the result which obtains. It defies logic to say on the one hand a defendant is legally innocent of the charge and, using the same conduct, in the same court and case, convict him on another charge covering the same essential elements.

IV. IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTIONS FOR MISTRIAL UNDER THE FACTS OF THIS CASE.

The transcript is replete with misstatements, conclusions and characterizations by witnesses for the Government regarding defendant's activities. See for example, R. T. p. 35. Consequently defendant was held out as being a heavy trafficker in contraband and thus the jury was prone to convict on any charges made by the United States Attorney and, in fact, did. Certainly loose characterizations or misleading references in a case such as this could not but result in prejudice to defendant, and by reason thereof, defendant should be granted a new trial.

CONCLUSION

For the reason set out above the judgment of the court
should be reversed.

Respectfully submitted,

O. W. GOAKEY

COLLEY AND MCGHEE

By: Milton L. McGhee
Attorneys for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK E. EALEY,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

NO. 21520

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

EUGENE G. CUSHING
United States Attorney

FILED

MAY 25 1967

MICHAEL J. SWOFFORD
Assistant United States Attorney

WM. B. LUCK, CLERK

MAY 25 1967

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2. Other References

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1 STATEMENT OF JURISDICTION^{1/}

2 Appellant was charged in a six-count Indictment with
3 violation of the Federal Narcotics Laws. Said Indictment
4 is set forth as follows (Ct. 1):

5 COUNT I

6 That on or about December 16, 1965, at Seattle,
7 Washington, within the Northern Division of the
8 Western District of Washington, FRANK E. EALEY did
9 knowingly and unlawfully conceal and sell a quantity
10 of narcotic drugs, to wit, approximately 30.773
11 grams of heroin hydrochloride, knowing the same to
12 have been imported into the United States contrary
13 to law.

14 All in violation of 21 U.S.C. 174.

15 COUNT II

16 That on or about January 13, 1966, at Seattle,
17 Washington, within the Northern Division of the
18 Western District of Washington, FRANK E. EALEY did
19 knowingly and unlawfully conceal and sell a quantity
20 of narcotic drugs, to wit, approximately 66.921
21 grams of heroin hydrochloride, knowing the same to
22 have been imported into the United States contrary
23 to law.

24 All in violation of 21 U.S.C. 174.

25 COUNT III

That on or about December 16, 1965, at Seattle,
Washington, within the Northern Division of the
Western District of Washington, FRANK E. EALEY did
knowingly and unlawfully sell, disperse and distri-
bute a quantity of narcotic drugs, to wit, approxi-
mately 30.773 grams of heroin hydrochloride, not in

^{1/} In this brief (Ct.) will refer to the number of the
records herein given by the Clerk of the Court for the Western
District of Washington. (Tr.) will refer to the Court
Reporter's transcript of proceedings. (Ex.) will refer to
exhibits.

1 or from the original stamped package.

2 All in violation of Title 26, U.S.C.,
3 Section 4704(a).

4 COUNT IV

5 That on or about January 13, 1966, at Seattle,
6 Washington, within the Northern Division of the
7 Western District of Washington, FRANK E. EALEY did
8 knowingly and unlawfully sell, disperse and distri-
9 bute a quantity of narcotic drugs, to wit, approxi-
0 mately 66.921 grams of heroin hydrochloride, not
1 in or from the original stamped package.

2 All in violation of Title 26 U.S.C.,
3 Section 4704(a).

4 COUNT V

5 That on or about December 16, 1965, at Seattle,
6 Washington, within the Northern Division of the
7 Western District of Washington, FRANK E. EALEY did
8 knowingly and unlawfully sell a quantity of narcotic
9 drugs, to wit, approximately 30.773 grams of heroin
0 hydrochloride, not in pursuance of a written order
1 of the person to whom such heroin hydrochloride was
2 sold on a form issued in blank for that purpose by
3 the Secretary of the Treasury or his delegate.

4 All in violation of Title 26, U.S.C.,
5 Section 4705(a).

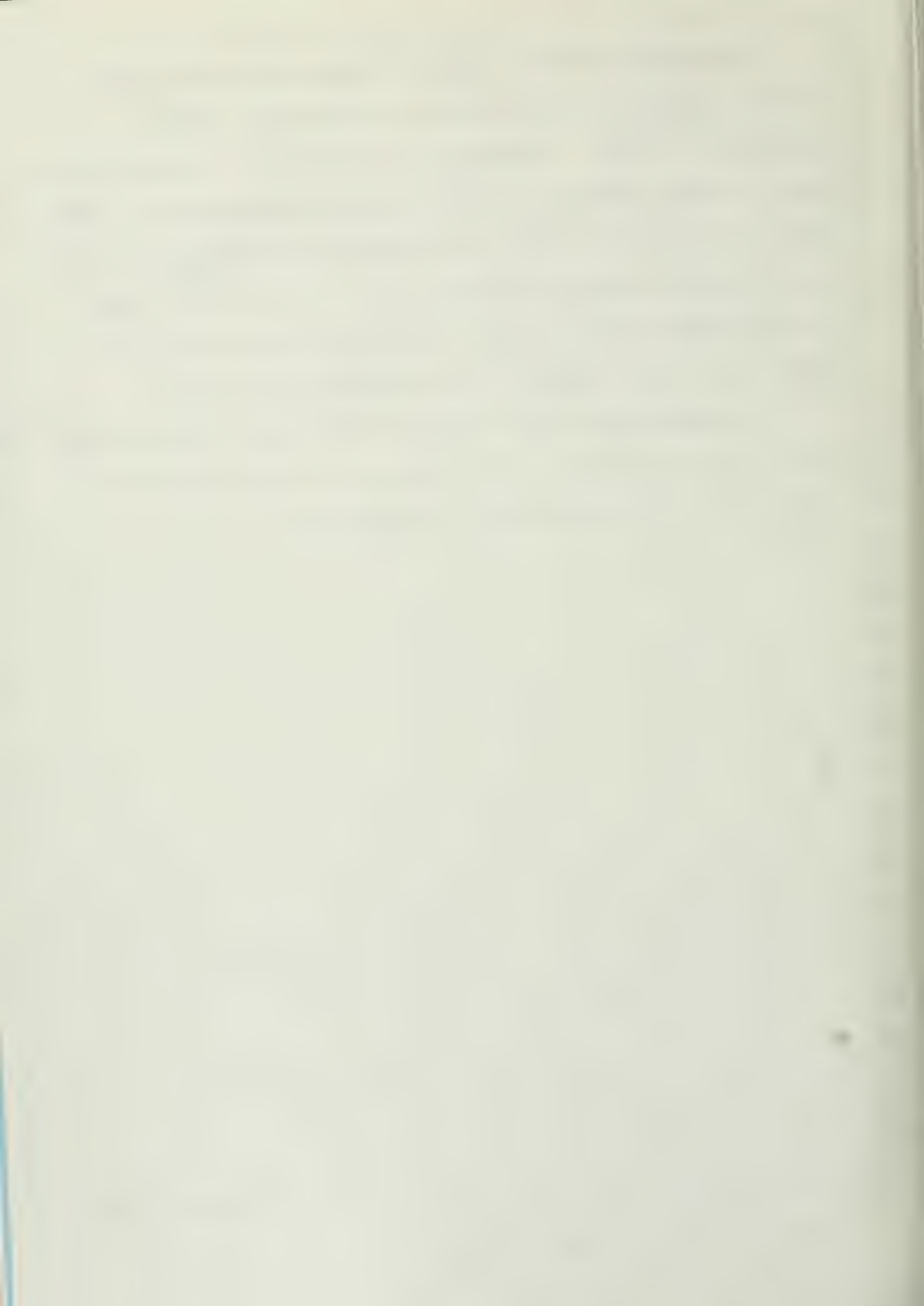
6 COUNT VI

7 That on or about January 13, 1966, at Seattle,
8 Washington, within the Northern Division of the
9 Western District of Washington, FRANK E. EALEY did
0 knowingly and unlawfully sell a quantity of narcotic
1 drugs, to wit, 66.921 grams of heroin hydrochloride,
2 not in pursuance to a written order of the person
3 to whom such heroin hydrochloride was sold on a form
4 issued in blank for that purpose by the Secretary of
5 the Treasury or his delegate.

6 All in violation of Title 26, U.S.C.,
7 Section 4705(a).

1 Defendant entered a plea of not guilty as to each
2 count on August 17, 1966, and was tried by a jury on
3 September 6, 1966. A verdict of guilty was returned by the
4 jury on each count of the Indictment on September 6, 1966,
5 and on October 28, 1966, the Judgment and Sentence was pro-
6 nounced and imposed on Counts I, II, V and VI (Ct. 10).
7 The defendant was acquitted on Counts III and IV of the
8 Indictment on a finding of not guilty by the Court.

9 Jurisdiction of the District Court was based on Title 18,
10 U.S.C., Section 3231. This Court has jurisdiction of the
11 appeal under Title 28 U.S.C., Section 1291.
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1 COUNTERSTATEMENT OF THE CASE

2 The testimony taken at the trial established the
3 following: The Seattle office of the Federal Bureau of
4 Narcotics suspected Frank Ealey of engaging in narcotic sales
5 in the Seattle area and commenced an investigation of his
6 activities in October of 1965 (Tr. 6,7). Joseph Gordon, a
7 King County Deputy Sheriff, was loaned to the Federal Bureau
8 of Narcotics as an undercover agent (Tr. 30) and met the
9 defendant Frank Ealey on December 7, 1965 (Tr. 31). Arrange-
10 ments were made at that time for Gordon to purchase narcotics
11 from Ealey in the future (Tr. 32). On December 16, 1965,
12 Deputy Sheriff Gordon was furnished with \$500.00 of official
13 Government advance funds (Tr. 34) and met with defendant Ealey
14 at the Lin-Villa Motel in Seattle (Tr. 36) where Gordon paid
15 Ealey \$350.00 for narcotics (Tr. 39). Ealey pointed to a
16 paper sack located in a tree just outside the door of his
17 unit at the Lin-Villa Motel and Deputy Gordon retrieved the
18 paper sack which contained a white substance (Tr. 39) which
19 later proved to be 30.7 grams of heroin hydrochloride
20 (Tr. 96-97). On January 13, 1966, Narcotics Agent Joseph
21 Ferro furnished Deputy Gordon with \$1,100.00 of official Govern
22 ment advance funds with which to purchase narcotics from defen
23 dant Frank Ealey (Tr. 47-48). Deputy Gordon, on that date,
24 met Ealey at an apartment house located at 2801 Yesler Way
25 where Ealey sold to Gordon a rubber container with white

1 powder therein for \$1,050.00 (Tr. 51). The white powder
2 contained inside said container proved to be 66.9 grams of
3 heroin hydrochloride (Tr. 98-99).

4 The testimony of Deputy Gordon was corroborated by
5 Agent Joseph Ferro (Tr. 5-27) and by Narcotics Agent Aubrey
6 Abbey (Tr. 74-93). Deputy Gordon further testified that he
7 was not registered with anyone to purchase narcotics except
8 in the course of his official duties (Tr. 57 and 58).

9 At the close of the Government's case, defense counsel
10 moved for a mistrial and for a judgment of acquittal on all
11 six counts (Tr. 104-108). The Court denied the motion for
12 a mistrial and denied the motion for a judgment of acquittal
13 as to Counts I, II, V and VI, while reserving ruling on the
14 motion for judgment of acquittal on Counts III and IV (Tr. 108).
15 The defendant then took the witness stand. When the defense
16 rested (Tr. 121) the defense failed to renew its motion for
17 a judgment of acquittal on all counts (Tr. 121-124). After
18 the Court had instructed the jury and had allowed the jury
19 to retire to the jury room, the defense then renewed its
20 motion for judgment of acquittal as to Counts III and IV only
21 (Tr. 143).

22 QUESTIONS PRESENTED

23 1. Counts III and IV

24 (a) Whether defense requested its motion for a
25 judgment of acquittal in a timely manner.

1 (b) Whether a Trial Court has the authority to
2 reserve ruling on a motion for acquittal and submit the issue
3 to the jury.

4 2. Whether the Trial Court committed prejudicial error
5 by submitting Counts V and VI to the jury.

6 3. Whether the defendant's acquittal on Counts III and
7 IV forecloses conviction on Counts I and II.

8 4. Whether there were any grounds for a mistrial.

9 SUMMARY OF ARGUMENT

10 1. (a). Defendant did not make a motion for judgment of
11 acquittal at the close of all testimony; hence, the sufficien-
12 cy of the evidence on Counts III and IV is not subject to
13 review at this time.

14 (b). A Trial Court has the authority to reserve its
15 ruling on a motion for acquittal if the motion is made at the
16 close of all the evidence and to submit the issue to the jury.

17 2. The sufficiency of the evidence on Counts V and VI
18 is not subject to review at this time because no motion for
19 acquittal was made at the close of all the evidence.

20 3. The evidence is sufficient to warrant conviction on
21 Counts I and II.

22 4. No grounds for mistrial were cited in appellant's
23 brief.
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ARGUMENT

I

A TRIAL COURT HAS THE DISCRETION TO RESERVE RULING
ON A MOTION FOR ACQUITTAL AND SUBMIT THE ISSUE TO
THE JURY

The record reveals that the trial court instructed the jury as to the law on each of the six counts contained in the Indictment, (TR 125-143) after which the jury returned a verdict of guilty on all six counts. Thereafter, at the time of sentencing, the trial court reversed the jury verdict as to Counts III and IV and entered a judgment of acquittal on said counts. Appellant charges that the trial court followed incorrect procedure and does not, within its discretion, have the right to reserve its ruling on counts such as III and IV.

Rule 29 of the Federal Rules of Criminal Procedure specifically authorizes the Court to reserve decision when a motion for judgment of acquittal has been made:

(b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns the verdict or after it returns a verdict of guilty or is discharged without having returned a verdict... [emphasis supplied]

This provision has been upheld in Jackson v. United States, 250 F.2d 897 (5th Cir. 1958) at page 901:

1
2 The court may reserve a ruling on a motion for
3 acquittal made at the close of all the evidence
and submit the case to a jury.

4 See also Cooper v. United States, 321 F.2d 274 (5th Cir. 1963),
5 and Weathers v. United States, 322 F.2d 566 (9th Cir. 1963).
6 And United States v. Gasomiser Corp., 7 F.R.D. 712 (1948),
7 states as follows at page 718:

8 This case clearly shows the value of the pro-
9 cedure preserved by Rule 29(b) of the Rules of
Criminal Procedure. Under such a rule the court
10 may allow a jury to pass upon the facts with
possible affirmative verdict of not guilty for
11 a defendant and at the same time, after proper
reservation, maintain its jurisdiction to direct
12 in a proper case an acquittal as a matter of law.

13 It should be noted, however, that appellant did not make a
14 motion for a judgment of acquittal on Counts III and IV "at
15 the close of all the evidence" and prior to jury instructions,
16 as required by Rule 29(b). The motion was made at the close
17 of the Government's case (TR 105) and was not renewed until
18 after the jury had been instructed and retired to deliberate.
19 (TR 143) The law setting forth the time when such motions
20 must be filed will be cited in Argument II of this brief, *infra*.

21 Appellant cites two cases in support of its position,
22 Chichos v. Divideria, 87 S.Ct. 271 (1966) and United States ex
23 rel Hetenyi v. Wilkens, 384 F.2d 844 (2nd Cir. 1965), cert. den.
24 Mancusi v. Hetenyi, 383 U.S. 913. Government counsel cannot
25

1
2 locate a 1966 Supreme Court decision entitled Chichos v.
3 Divideria; however, perhaps appellant's counsel is referring
4 to the case of Cichos v. Indiana, decided by the Supreme Court
5 in October, 1966. If this is the case, neither the Cichos
6 case nor the Hetenyi case are in point because both deal with
7 the issue of double jeopardy, which is not a problem in this
8 case.

9 Appellant further contends there was not any evidence
10 presented indicating that the defendant knowingly sold a
11 quantity of narcotics "not in or from the original package"
12 and therefore, the issue should not have gone to the jury.
13 Appellant cites Epstein v. United States, 174 F.2d 754 (6th
14 Cir. 1949), which case is not in point. The narcotic drugs
15 themselves, Government's Exhibits 1 and 2, were admitted into
16 evidence (TR 97 and 99) and were available to the jury for
17 examination during their deliberation. Surely the jury could
18 examine in the jury room the drugs and the propholactic in
19 which they were contained, and note that no revenue stamp was
20 affixed thereto. Title 26, United States Code, Section 4704(a)
21 provides in part as follows:

22 ...the absence of appropriate tax paid stamps
23 from narcotic drugs shall be prima facie evidence
24 of a violation of this subsection by the person
25 in whose possession the same may be found.

1
2
3 The court instructed the jury as to this statutory provision
4 in the following language:

5 With regard to Counts III and IV, the absence
6 of appropriate tax paid stamps from the heroin
7 hydrochloride is prima facie evidence of a
8 violation of the applicable law by the person in
9 whose possession they may be found. (TR 133)

10 Hence, there was more than a scintilla of evidence presented
11 and the court could properly allow issues III and IV to go to
12 the jury.

13 In summary, a trial judge has the discretion to reserve
14 ruling on a motion for acquittal, and to submit the issue to
15 the jury. By so doing, the defendant in this case was not
16 prejudiced by the court's procedure, especially when the
17 record herein shows that the defendant was ultimately acquitted
18 on Counts III and IV of the Indictment.

19 II

20 THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY
21 SUBMITTING COUNTS V AND VI TO THE JURY

22 Appellant attacks the sufficiency of the evidence
23 regarding Counts V and VI of the Indictment and alleges that
24 said counts should not have been submitted to the jury. The
25 Government contends that appellant did not move for a judgment
of acquittal on Counts V and VI at the time required by law.
Page 104 and 105 of the transcript reveal that appellant

1 moved for a judgment of acquittal on all counts of the
2 Indictment at the close of the Government's case. At page 108
3 the court denied appellant's motion for a mistrial and also
4 denied motion for judgment of acquittal on Counts I, II, V
5 and VI. The appellant, Frank Ealey, then took the stand and
6 after he had testified, the defense rested. (TR 121) No
7 motions for judgment of acquittal as to Counts V or VI were
8 made at the conclusion of the evidence, or at any time there-
9 after (TR 121-124). Hence, the appellant is unable to question
10 the sufficiency of the evidence as to Counts V and VI on this
11 appeal.

12 It is well stated in Picciurro v. United States, 250
13 F.2d 585 (8th Cir. 1958) at page 589:

14 In order to entitle a defendant to question
15 the sufficiency of the evidence he must first
16 have presented the question to the trial court
17 by motion for judgment of acquittal interposed
18 at close of all the testimony, thus raising
19 a question of law which this court will
20 consider on appeal, and it is well settled
21 that absent such motion this court will not
22 review the evidence. 7th Amendment, U.S.
23 Constitution; (Cases cited). [emphasis added]

24 The Picciurro case is identical to the one in question in
25 that defense counsel at the close of the Government's
evidence moved for judgment of acquittal which motion was

1
2 denied. The defendant failed to renew his motion at the
3 close of all evidence, and the court therefore refused to
4 review the evidence on appeal. See also Rosenbloom v.
5 United States, 259 F.2d 500 (8th Cir. 1958); Costner v.
6 United States, (6th Cir. 1959). The rationale is stated in
7 Corbin v. United States, 253 F.2d 646 (10th Cir. 1958)
8 at page 647:

9
10 At the conclusion of the Government's case,
11 Corbin demurred to the evidence and moved for
12 a directed verdict. After adverse ruling by
13 the court thereon, he presented evidence in
14 defense of the charges. By this action he
15 waived any objection he may have had to
16 such rulings. At the conclusion of their
17 presentation of evidence, Corbin made no
18 motion for a judgment of acquittal or any
19 other motion attacking the sufficiency of the
20 evidence. [emphasis supplied]

21 Hence, the general rule is that a Federal appellate court
22 will not pass upon the sufficiency of the evidence to
23 support a verdict in the absence of a motion for a
24 judgment of acquittal interposed at the close of all
25 testimony.

1 In summary, since appellant failed to move for a
2 judgment of acquittal on Counts V and VI at the close of all
3 testimony, the sufficiency of the evidence on said counts
4 is not subject to review at this time. This argument also
5 applies to Counts III and IV, discussed supra in Argument I
6 inasmuch as appellant did not move for a judgment of acquit-
7 tal on those counts at the close of the testimony.

8
9 III

10 DEFENDANT'S ACQUITTAL ON COUNTS III AND IV
DOES NOT FORECLOSE CONVICTION ON COUNTS I AND II

11 Appellant contends that acquittal on Counts III and IV
12 prevent a conviction on Counts I and II because 21 U.S.C.,
13 174 and 26 U.S.C., 4704(a) each require the knowing sale of
14 a quantity of contraband. The Government contends that such
15 an allegation presents a frivolous defense.

16 Both 21 U.S.C. 174 and 26 U.S.C. 4704(a) require as an
17 element of proof testimony showing the sale of a narcotic
18 drug. The evidence in this case proving sale is overwhelming,
19 consisting of direct testimony from the King County Deputy
20 Sheriff, Joseph Gordon, that he actually purchased heroin
21 hydrochloride from the defendant Ealey on December 16, 1965
22 and January 13, 1966. His testimony is corroborated by that
23 of Narcotic Agent Joseph Ferro and Narcotic Agent Aubrey
24 Abby. The second element of proof necessary to sustain a
25

1 conviction under 21 U.S.C. Section 174 is that the defendant
2 knew the narcotic drug was imported or brought into the United
3 States contrary to law. Since it is often difficult to trace
4 the course of travel of a quantity of narcotic drugs, 21 U.S.C.
5 174 contains a presumption that unexplained possession of a
6 narcotic drug is deemed sufficient evidence to authorize
7 conviction unless the defendant explains the possession to
8 the satisfaction of the jury. The testimony of King County
9 Deputy Sheriff, Joseph Gordon, amply shows that the defendant
10 did in fact have possession of the narcotic drug on the dates
11 charged in the Indictment, and the defendant did not explain
12 said possession. This presumption has held valid by the
13 Court of Appeals for the Ninth Circuit in Brown v. United
14 States, (9th Cir., decided Dec. 30, 1966). Hence, the evi-
15 dence is ample to support the defendant's conviction under
16 Counts I and II, and the defendant's allegation is without
17 merit in fact and without support in law.

18 IV

19 THERE WERE NOT ANY GROUNDS FOR A MISTRIAL

20 Appellant charges that the transcript is replete with
21 mis-statements, conclusions and characterizations by witnesses
22 for the Government regarding defendant's activities, and that
23 a motion for mistrial should have been granted. However,
24 the only specific example cited in defendant's brief refers
25 to Page 35 of the transcript, where King County Deputy

1 Sheriff Gordon, the undercover agent, testified that his
2 cover story when first meeting Ealey was that he was
3 inexperienced and had received complaints about previous
4 narcotics. It is impossible to visualized how this testi-
5 money would have harmed the appellant's defense, especially
6 in view of the fact that the Court instructed the jury to
7 disregard the statement referring to previous narcotics
8 (TR 35-36). As stated in Glasser v. United States, 315 U.S.
9 60, 83

10 We must guard against the magnification
11 on appeal of instances which were of little
12 importance in their setting.

13 CONCLUSION

14 For the reasons set forth above, the Government
15 respectfully urges that the conviction by the trial court
16 as to Counts I, II, V and VI of the Indictment be sustained.

17 Respectfully submitted,

18
19 EUGENE G. CUSHING
United States Attorney

20
21 MICHAEL J. SWOFFORD
22 Assistant United States Attorney
23
24
25

1 I certify that, in connection with the preparation of
2 this brief, I have examined Rules 18 and 19 of the United
3 States Court of Appeals for the Ninth Circuit, and that, in
4 my opinion, the foregoing brief is in full compliance with
5 these rules.
6
7

8 MICHAEL J. SWOFFORD
9 Assistant United States Attorney
10
11

12 I hereby certify that a copy of the aforesaid Brief for
13 Appellee was mailed this date to:

14 Mr. O. W. Goakey
15 Suite 214, First National Bank Bldg.
16 Klamath Falls, Oregon

17 Colley and McGhee
18 1617 - 10th Street
19 Sacramento, California

20 Attorneys for Appellant

21 DATED at Seattle, Washington this _____ day of May,
22 1967.
23
24
25

26 MICHAEL J. SWOFFORD
27 Assistant United States Attorney

No. 21,520

United States Court of Appeals
For the Ninth Circuit

FRANK E. EALEY,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	
	<i>Appellee.</i>

APPELLANT'S PETITION FOR A REHEARING

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SEP 18 1907



**United States Court of Appeals
For the Ninth Circuit**

FRANK E. EALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING

To the Above Entitled Court:

Comes now appellant, Frank E. Ealey, and petitions the Court for rehearing herein:

I

That the above entitled Court rendered an order affirming judgment on August 15, 1967, and per curiam, stated: "The Court finds no reversible error in the record. The Judgment of conviction is affirmed."

II

That the sole ground upon which rehearing is requested is whether the trial Court committed prejudicial error by reversing its ruling on Counts III and IV of the indictment, submitting the same to the jury along with other counts in the indictment, contrary to FRCP 29. This issue, insofar as our research indicates, has never been ruled upon and to give guidance

to the trial Courts, the Government and defendants in criminal cases, this Court should reconsider its ruling as to whether E.R.C.P. 29 permits of the practice followed by the trial Court in the instant case.

Dated, Sacramento, California,
August 30, 1967.

O. W. GOAKEY,
COLLEY AND MCGHEE,
By MILTON L. MCGHEE,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

Pursuant to Rule 23, I, Milton L. McGhee, one of the attorneys of record herein for Appellant, hereby state:

That I am personally familiar with transcripts, records and documents on file herein and have heretofore personally handled the appeal of this case.

That in my judgment the ground on which petition for rehearing is requested is well founded and that this petition is not interposed for the purpose of delaying further proceedings herein.

I declare under penalty of perjury the foregoing is true and correct.

Dated, Sacramento, California,
August 30, 1967.

MILTON L. MCGHEE.



